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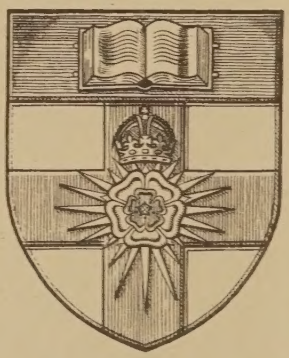

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CASES

DETERMINED BY THE

COMMON PLEAS DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE COMMON PLEAS DIVISION

XXXIX VICTORIA.

THE LONDON JOINT STOCK BANK *v.* THE MAYOR AND ALDERMEN OF THE CITY OF LONDON AND SARAH GRIESIELL. 1875 Nov. 2.

Lord Mayor's Court—Foreign Attachment—Corporation.

A debt due from a corporation cannot be attached in the Mayor's Court of London by virtue of the custom of foreign attachment, nor can there be a writ of fieri facias against the goods of a corporation as garnishees.

Semble, that a corporation cannot be defendants in an action in the Mayor's Court.

DECLARATION in prohibition, the substance of which was, that the plaintiffs complained that process of foreign attachment had been issued in an action in the Mayor's Court against them, as garnishees, by the Mayor's Court of London, they being a corporation, and not liable by law to any process of foreign attachment; and that the defendants threatened to enforce such process against the goods of the plaintiffs by a writ of fieri facias, and otherwise; and that the plaintiffs prayed that the recorder and all others the judges and officers of the said Court might be prohibited from enforcing or issuing or proceeding with any such process of attachment or writ of fieri facias, as aforesaid, against the plaintiffs; and that the defendants might be prohibited from

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prosecuting or suffering or permitting the said process of attachment to be prosecuted against the plaintiffs, and from proceeding with the said foreign attachment.

Third plea set out the custom of London as to foreign attachment as follows: "If any plaint of debt shall be levied or affirmed by any person in the Court of the Lord the King before the mayor and aldermen for the time being in the chamber of the Guildhall of the same city, being the Court in the declaration mentioned, and therein called the Lord Mayor's Court, so that by virtue of such plaint the same Court shall command any sergeant-at-mace of the same mayor within the same city, and the minister of such Court, to summon the party, defendant in the same plaint specified, to appear at the Court of the Lord the King, in the chamber of the Guildhall of the same city, holden before the mayor and aldermen of such city, to answer the plaintiff in the same plaint named in the plea in such plaint specified; and such sergeant-at-mace and minister at such Court, whereat such plaint shall be levied or affirmed, shall by virtue of such precept testify by word of mouth to the same mayor and aldermen, that the defendant, in the same plaint named, had nothing within the liberty of the city aforesaid whereby he might be summoned, and then the same defendant at the same Court shall make default; and thereupon in such Court the plaintiff named in such plaint shall testify and allege by word of mouth to the same mayor and aldermen, that some other person or body corporate, carrying on business within the said city and liberties thereof, has any goods and effects of such defendant in his hands or custody within the said city and jurisdiction of the said Court, or for any cause whatsoever is indebted to such defendant in any sum of money arising or accruing within the said city and liberties thereof, and within the jurisdiction of the said Court, amounting to the debt in the plaint aforesaid specified, or part thereof, then, on the petition of the plaintiff in the same plaint named, the same Court shall command such sergeant-at-mace and minister that the same sergeant shall attach the defendant in such plaint named by such goods and effects or such sum being in the hands or custody of such other person or body corporate, carrying on business within the said city and liberties thereof; and then, if such sergeant-at-mace and minister of the Court return and certify

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to such Court such defendant to be attached according to the said custom by such goods and effects or such sum of money so being in the hands or custody of such other person or body corporate, to be defended and kept, so that such defendant in such plaint named may or might appear at the same or the then next Court holden, or to be holden, to answer such plaintiff in the plea in such plaint specified; and if the defendant at that and three other Courts then next severally holden, or to be holden, before the mayor and aldermen of the said city in the chamber of the Guildhall of the said city, being solemnly called does not appear, but makes default, and such four defaults, according to the custom of the said city, are recorded against such defendant at such four Courts, after such attachment made, if such plaintiff in such plaint named at every of such four courts, in his own person, or by his attorney, appeared according to the custom of the said city, then and at the last of the said four courts, or at any court holden, or to be holden, after such four defaults recorded at the petition of such plaintiff in such plaint named made to the Court, it is and has been used for the Court to warn such other person, or body corporate, carrying on business within the city and liberties thereof, or being found within the said city, according to the custom of the said city, to be and appear at any court afterwards to be holden before the mayor and aldermen of the said city, to shew if anything he has or knows, or they have or know, to say for himself or themselves, why such plaintiff in such plaint ought not to have judgment and execution of such goods and effects or such sum so attached as aforesaid; and if at such court such sergeant-at-mace return and certify such other person, or body corporate, so named, to be warned, according to the said custom, to be and appear in the same court to shew such cause; and if such person, or body corporate, so warned, being solemnly called at such court, do not appear, or has not appeared, but makes or has made default, then it is, and from time immemorial it has been, used and accustomed for such court to award such plaintiff to have judgment and execution of such goods and effects, or sum so attached to satisfy such plaintiff the debt in such plaint specified, or so much thereof as such goods and effects, or such sum so attached, extends, or has extended to satisfy, by sufficient pledges

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to be found and given by such plaintiff in such plaint named in the court according to such custom, to restore to such defendant such goods and effects, or sum of money so attached, if such defendant, within a year and a day thence next ensuing, come or has come into the court so holden, and disproves or avoids, or has disproved or avoided, such debt in such plaint mentioned, according to the custom of the said city; and that after such pledges found and judgment and execution had of such goods and effects or sums so in the hands or custody of such other persons, or body corporate, attached or defended by the plaintiff in such plaint named, such other person or body corporate in whose hands or custody such goods and effects or sum is or has been attached, is or has been discharged against such defendant of the goods and effects or sum so attached and had in execution; and such defendant is or has been discharged against the said plaintiff of so much of his debt in such plaint demanded by such plaintiff, so long as such judgment and execution remains in force and effect, not revoked or disproved by such defendant; and if such goods and effects or sum of money so attached and defended and had in execution, and whereof judgment has been awarded as aforesaid, amount not, nor has amounted, to the whole sum of the debt in and by the said plaint demanded by such plaintiff against such defendant, then such plaintiff, by the custom of the said city, is, and from time immemorial has been used and accustomed, to have process against such defendant, according to such custom, for the residue of his debt by him in such plaint demanded."

The plea then proceeded in detail to set out proceedings in the Mayor's Court in foreign attachment against the plaintiffs in accordance with the custom as alleged in the plea, the substance being that a certain sum of money had been attached in the plaintiffs' hands in an action in the Mayor's Court between Sarah Griesiell and Thomas Griesiell, and the last proceeding stated being that the defendant in the Mayor's Court had made a fourth default in appearance, and thereupon such fourth default was duly recorded according to the custom, and the plea concluded by an allegation that the garnishment against the plaintiffs in the declaration alleged was the said garnishment and attachment in this plea set out and no other, by means whereof the said Court,

before the mayor and alderman aforesaid, had jurisdiction over the said plaint and proceedings, and over the plaintiffs in prohibition as garnishees, and over the defendant in the Mayor's Court, and that the said action in the declaration mentioned was the plaint in this plea aforesaid, and the said process of foreign attachment in the declaration mentioned was the attachment in this plea aforesaid.

Fourth plea repeating the allegations in the third plea, but omitting the words "had in execution," and "execution" of the said goods, effects, and sums whenever they occur in the statement of the custom.

Issues on and demurrers to both pleas.

Joinders in demurrer and demurrer to the replications joining issue on the pleas. (1)

June 1. *Benjamin, Q.C.* (*W. G. Harrison* and *Kemp* with him), for the plaintiffs, contended that the customary procedure in foreign attachment as set forth in all the authorities was in its nature inapplicable to a corporation; that a corporation could neither be made defendants nor garnishees in the Mayor's Court; that the custom involved a personal appearance in the Mayor's Court both in the case of the defendant and in that of the garnishee, whereas a corporation could not appear in person, but only by attorney; that a corporation could not be sued in an inferior court of limited jurisdiction because it could not plead to the jurisdiction, inasmuch as a plea to the jurisdiction must be pleaded in person; that the only mode of enforcing the attachment in the Mayor's Court as against the garnishee was by ca. sa.; that the plea was no answer so far as concerned that part of the declaration which sought to prohibit the issue of a fi. fa.; that there being no method given by the custom of enforcing the attachment against the garnishee except ca. sa., a writ which was not applicable to a corporation, it followed that a corporation could not be brought within the custom of foreign attachment at all.

Sir H. James, Q.C. (*Webster* with him), for the defendants, con-

(1) The ground of this demurrer was that the replication concluded to the country instead of concluding with a prayer that the truth of the plea should be inquired of as the Court might consider, and a suggestion of the custom of London to try by certificate.

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tended that the custom of foreign attachment might include a corporation; that, upon demurrer to the plea, it must be taken to be the same as if the custom had been certified by the recorder in the terms of the plea; that the demurrer admitted the existence of the custom, and the only question now before the Court was, whether the custom so admitted was good in law; that statements of the custom in former cases to be found among the authorities were not to be taken as exhaustive, and that it might be that only such part of the custom as was material in the particular case was from time to time certified; that the question of what the custom of foreign attachment was ought to be distinguished from the question how the judgment might be enforced as against the garnishee; that the mode of execution formed no part of the custom properly so called; that the terms in which the custom of foreign attachment was stated in the ancient authorities would include a corporation; that though the Court would not permit the process of foreign attachment to go on against the corporation if it could see clearly that no execution could go against a corporation, and therefore the process would be futile, yet, inasmuch as it did not appear on the record that execution could not go against the plaintiffs, but, on the contrary, it was stated by the plea, and admitted by the demurrer, that it could, the Court would not prohibit the foreign attachment; that it might well be that a writ of distringas, or some other mode of execution, would be applicable; and that whether that was so or not would be a question to be determined at a future stage, but was not at present raised; that what the declaration asked was that the process of foreign attachment against the plaintiffs might be prohibited, and if the plea shewed that a corporation was subject to that process down to a further stage than the proceedings as set forth in the plea had arrived at, there was no ground for a prohibition; that the express statutory exemptions given to certain corporations from foreign attachment shewed that corporations in general were subject to it; that if the original terms of the custom were such as did not exclude corporations, the custom might be applied to corporations when occasion demanded, with such modification of details as might be necessary; that a corporation was a person in the eye of the law, and a custom applicable to an

ordinary person would presumably be applicable to such artificial legal person; that the mere machinery of the application of the custom to ordinary persons was not so far part of the custom itself as to prevent its application to another sort of personage by such machinery suitable to the different nature of such other personage as might be available.

Benjamin, Q.C., in reply.

[The following authorities were referred to in addition to those cited in the judgment: 1 Chitty on Pleadings, p. 457; Brandon, Foreign Attachment, p. 59; Brooke's Abridgment, London, p. 1; *Trustees of Dundee Harbour* v. *Dougal* (1); *Rex* v. *Gardner* (2); Coke's Entries, Det. 142; 8 & 9 Wm. 3, c. 20, s. 47; *Rex* v. *Birmingham and Gloucester Ry. Co.* (3); *City of London* v. *Vanacre* (4); Viner's Abridgment, Execution, p. 581.]

Cur. adv. vult.

Nov. 2. The judgment of the Court (Lord Coleridge, C.J., and Brett, Grove, and Lindley, JJ.,) was delivered by

LORD COLERIDGE, C.J. In this case, which was heard before my Brothers Brett, Grove, and Lindley, and myself, I have now to deliver the judgment of the Court.

The plaintiffs in this case are one of the many banking corporations having offices within the city of London, and carrying on the business of bankers within it. The defendants are the Lord Mayor and Aldermen of London. The pleadings before us raise the very important questions, whether such corporations as the plaintiffs' can be made garnishees in the customary process of foreign attachment, whether the money of their customers can be attached in their hands, and whether in actions between their customers and third persons payments of money due from their customers to such persons can be enforced by execution against the goods of the banking corporations. These precise points,—plainly of great practical importance,—have never been decided; and, from their novelty and importance, as well as from the learning and research brought to bear upon them in the argument before us, it has been necessary to examine the authorities with care before pronouncing

(1) 1 Macq. 317.
(2) 1 Cowp. 79.
(3) 3 Q. B. 223.
(4) 1 Ld. Raym. 496; 12 Mod. 269.

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judgment in this case. The pleadings require to be looked to, both because much of the argument turned upon the particular words used in them, and because it is upon the existence of the right so claimed and so ascertained by the defendants, and on no other right, that we now decide.

The declaration, which is in prohibition, sets out a process of foreign attachment in a case in which the now defendant Sarah Griesiell was plaintiff against Thomas Griesiell, whereby all the moneys, goods, and effects of Thomas Griesiell which the now plaintiffs have or which shall hereafter come into their hands or custody, are attached: and the declaration goes on to state that the defendants threaten to enforce the process of foreign attachment by a writ of fieri facias or otherwise against the goods of the plaintiffs.

There are two pleas which have been pleaded and demurred to, both of which it may be necessary to consider. But the important plea is the third, which does not deny that the defendants threaten to issue a writ of fieri facias against the goods of the plaintiffs; but it sets out the custom of foreign attachment very much as it has been repeatedly set out in cases to be found in the books, but by the insertion throughout the plea of the words "body corporate" it extends the custom to the case of debts and goods in the hands of a corporation as garnishees. The plea also alleges, and this is most important, as part of the custom, "that, if such person or body corporate so warned, being solemnly called at such court, do not appear or has not appeared, but makes or has made default, then it is and from time immemorial it has been used and accustomed for such court to award such plaintiff to have *judgment and execution* of such goods and effects or sum so attached, to satisfy such plaintiff the debt in such plaint specified, or so much thereof as such goods and effects or sum so attached respectively extend or have extended to satisfy."

One of the points relied upon in support of the demurrer was, that the plea itself does not, as pleaded, shew any authority to enforce the attachment by fieri facias against the garnishees' goods, and yet that, in the case of a corporation, fieri facias is the only process by which the attachment could be enforced. We think the language as it stands sufficient to assert the authority. But it is

not really material to decide this, because, as we understand the legal existence of this authority to be one of the most important points on which our judgment is asked, we should certainly, if necessary, permit an amendment of the language of the plea so as clearly to assert it.

But larger and more important questions were raised before us,—whether a corporation could be made defendants in the Lord Mayor's Court at all, and whether the custom of foreign attachment originally extended, or could be made now to extend, so as to include debts due to a corporation as defendants, or debts due from a corporation as garnishees in foreign attachment. It is important also to observe that the case here is not that of goods belonging to the defendant, and which are in the garnishees' hands, but that of a debt due from the garnishees to the defendant; and the custom proposed to be set up is, to enforce the attachment, and the payment to a third person of his debt, by a fieri facias against the goods of the garnishees. It seems necessary, therefore, to inquire what was the ancient customary process against defendants in actions of debt before the passing of the Common Law Procedure Act, 1852; what means there were of compelling a defendant to appear; and then, whether the customary process of the court could have gone against a corporation as defendants. When these matters are clearly understood, it will probably not be very difficult to determine the question whether the custom of foreign attachment can be enforced against a corporation as garnishees.

At what exact point of time the courts in the city of London were separated from one another and took their present names, it is neither easy nor material to state with certainty. The older authorities, the Liber Albus, published under the authority of the Master of the Rolls, Lord Coke's 4th Inst. p. 247, and Bacon's Abridgment, 'Courts in London,' either do not mention the Lord Mayor's court as a court of law separate from the court of husting and the sheriff's court, or do not mention the custom of foreign attachment as belonging to it. But the Lex Londinensis, published in 1680, from which much of Bohun's Privilegia Londini appears to have been taken, and the book of Bohun just mentioned, speak both of the Lord Mayor's court and of the

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custom of foreign attachment as belonging to it, in language quite unambiguous. The ordinary mode of procedure in the Lord Mayor's court against a defendant is thus described by Bohun, p. 251, following almost word for word the Lex Londinensis: "In this court all manner of actions may be tried by a jury, as in other courts, for any matters whatsoever arising within the liberties of London, to any value whatsoever, as for debt at the plaintiff's suit, &c. There are only four attorneys belonging to this court. . . . When your action is entered by the attorney or his clerk, you must not employ any of the sheriffs' officers to *arrest the defendant*, but give your action or a note thereof to one of the serjeants-at-mace belonging to the mayor and aldermen. If you give any of the serjeants a note of your action, he will *arrest* the defendant, and, in case *such defendant cannot find bail*, the officer will *carry him to one of the compters*, that being the prison as well for this court as the sheriff's court; which imprisonment and the cause thereof is constantly recorded in a particular book called the nisi prius book by the attorney that entered the action; but, if the *party arrested* find bail, the eldest of the four attorneys must take the same." Mutatis mutandis, the process was substantially the same, that is to say, to compel the appearance of a defendant by *arrest, and by arrest only*, in the sheriffs' court. This will appear by reference to the Privilegia Londini, tit. Sheriffs' Courts, and to the City Law (following the Liber Albus), pp. 69, 72. Farther, there are lists of fees in the sheriffs' court and in the Courts at Westminster set out in the Privilegia Londini, pp. 446–450; and it results from these that the only way in the city courts to compel the appearance of a defendant was by *personal arrest*. If the defendant appeared voluntarily on notice of the action, as he might do, no question of arrest arose.

Indeed, until times comparatively recent the appearance of the defendant was necessary for obtaining judgment; and in personal actions in the superior Courts there were various methods of compelling appearance after writ. If the writ could not be served personally, a distringas was necessary. From Comyns's Digest, tit. Process, it will be seen that the first process against a defendant who could not be personally served was a distringas or distress infinite; in which case the sheriff took all the goods of the party

until he appeared. And this appears to have been the only mode, both in the Courts of common law and in the Court of Chancery, for enforcing the appearance of a corporation: see Brooke's Abridgment, Corporations, 43; Comyns's Digest, Corporation, (B. 1), (B. 2); Viner's Abridgment, Corporation (B. a.) 3; *Thusfeild* v. *Jones* (1), in which the language of the Court as to distringas is very noticeable. In like manner, in the Courts of Chancery, the only method to compel the appearance of a corporation was distringas: Viner's Abridgment, Corporation (B. a.) 2; Cases in Chancery, 204: see also the judgment of the Lord Keeper Sir Nathan Wright in *Harvey* v. *East India Co.* (2)

Later authorities have entirely sustained this view. Hawkins, P. C. 2, 27, 14, says that the method of compelling the appearance of the defendant in criminal information is, "to make out a *capias* where defendants are informed against in their private capacity, and a *distringas* where they are sued as a corporation aggregate." To the same effect is the judgment of Lord Loughborough in *Corporation of London* v. *Mayor of Lynn.* (3) The judgment of Patteson, J., in *Rex* v. *Birmingham and Gloucester Ry. Co.* (4) is to the same effect. In that case, the corporation had been indicted at sessions, at which court the appearance must be personal, whereas a corporation can appear only by attorney,—"The prosecutor," says Patteson, J., "will be obliged to remove the indictment by certiorari into the Queen's Bench, in order to make it effective. The proper mode of proceeding against a corporation is *by distress infinite to compel appearance*, after removal by certiorari." So, in Chancery, the modern practice of compelling the appearance of a corporation aggregate has continued to be by distringas: see 1 Dan. Ch. Pr. p. 401, 5th ed.

It follows from these authorities that the *customary* process in the Lord Mayor's court was exclusively personal, and that the only way of compelling appearance was by proceeding against the person. It follows also that, at common law, and also in Chancery, the only way of compelling a corporation to appear was by distringas: and it follows that until recently a corporation could not have been made defendants against their will in the Lord Mayor's court; at

(1) Skin. 27.
(2) 2 Vern. 395.
(3) 1 H. Bl. 206.
(4) 3 Q. B. 223.

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least, by any process analogous to that which was employed in the superior Courts of the country. This, no doubt, leaves the question open, whether they could under the customary process have been forced into the Lord Mayor's court as defendants, by attachment of their goods or money in the hands of a garnishee,—a point which it may become necessary to consider.

Apart, however, entirely from the last-mentioned point, it may be a question whether recent legislation has not extended the jurisdiction of the Lord Mayor's court so as incidentally to include corporations. The 2 & 3 Wm. 4, c. 39, s. 13, re-enacted by the 10th section of the Common Law Procedure Act, 1852, which latter Act itself abolished distringas and substituted other procedure, no doubt operated, both of them, on corporations: and by Order in Council of November, 1863, the 10th section of the Common Law Procedure Act, 1852, together with other sections both of that Act and of the Common Law Procedure Act, 1854, were applied to the Lord Mayor's court. The procedure, however, thus applied begins with and depends upon a writ of summons; and in the Lord Mayor's court there is no such writ. Furthermore, it seems clear that a corporation cannot plead to the jurisdiction. A plea to the jurisdiction must be pleaded in person: for, if a plea be put in by an attorney, who is an officer of the court, it must be supposed to be put in by the leave of the court first had; and such leave acknowledges the jurisdiction: Bacon's Abridgment, Courts (D. 3.). And the 15th section of the Lord Mayor's Court Act, 1857, enacts in terms with which we are familiar in this Court, "No defendant shall be permitted to object to the jurisdiction of the court in or by any proceeding whatsoever, *except by plea.*" It is not material to inquire whether the view hitherto assumed, rather than decided, in this Court, that a prohibition to restrain excess of jurisdiction must be moved for in the superior Courts by some person other than the defendant, be correct; or whether the Master of the Rolls is right in the view he intimated a short time since in *Jacobs* v. *Brett* (1), that the effect of this enactment is confined to the Lord Mayor's court itself; because, whichever view be adopted, the strength of the argument remains untouched, that the Act could never have intended to include within the jurisdiction of an inferior court bodies which, even if so

(1) L. Rep. 20 Eq. 1.

minded, have no means of questioning the jurisdiction of the court in the court itself in the only mode sanctioned by the words of the Act.

It seems, then, that by the customary process of the Lord Mayor's court a corporation cannot be made defendants therein, and that it is at least very doubtful whether they can be made so by the recent statutory procedure.

But, although this is important towards deciding, yet it does not decide the question which arises incidentally, whether a corporation can be either defendants or garnishees in an attachment proceeding according to the custom. Nor does it decide the question which is distinctly raised before us, whether there is any custom to take the garnishees' goods by fieri facias after judgment against the garnishees.

The custom of foreign attachment is first certified by Starkey, the recorder of London, in the reign of Edward IV.; and his certificate is set out in *Cox* v. *Mayor of London.* (1) By that certificate it appears that the suggestion of the garnishee's debt to the defendant followed upon the *arrest of the defendant;* and Mr. Justice Willes, in his judgment in the same case, says that the custom must have originated in times when all process was personal against the body of the defendant. The custom is also set out in the Liber Albus, pp. 207 et seq., and in The City Law, following the Liber Albus, pp. 81 et seq. Two things appear from the description of the custom given in the passages referred to,—first, that there was a substantial difference in the procedure when there were goods of the defendant in the hands of the garnishee, and when the garnishee was debtor to the defendant. In the former case, there was to be *appraisement* and after that *delivery:* in the latter, the debts stopped in the hands of the debtors were to be *levied* and *delivered* to the plaintiff. This levying appears from the following page (208) to have been a receipt of the debt in specie from the hands of the debtor; and there is no suggestion whatever that the debt was to be levied by a fieri facias on the goods of the garnishee. Secondly, it appears that the garnishee might come into court and make oath that he owed nothing,—a portion of the custom as anciently stated which must not be forgotten.

(1) Law Rep. 2 H. L. at p. 242.

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In the statement of the custom in Brooke's Abridgment already referred to goods only are mentioned, and not debts due from the garnishee. In Rolle's Abridgment, Custom of London, K. 4, debts are mentioned; but it is expressly stated that the garnishee is to *come* and answer the allegation of indebtedness, and that, *if he comes*, and does not answer it, then the debt shall be attached in his hands. This statement of Rolle is followed almost verbatim by the Privilegia Londini, p. 253. The farther procedure is then set out in detail and with great clearness in the same book: "The person in whose hands the attachment is made is called the *garnishee*, because of his being warned not to pay the money, but to *appear* and answer the plaintiff's suit; after such attachment made, the garnishee, if he think fit, may appear in court by his attorney, and wage law, or plead that he has no money in his hands of the defendant's, or other special matter, or he may confess it." It is then further stated that the defendant may dissolve the attachment by putting in bail and thereby discharge the judgment and proceedings against the garnishee; "yea, *though the garnishee be taken in execution*, he shall be discharged if bail be put in."

The case of goods of the defendant in the garnishee's hands is next dealt with; and it is stated that, after the jury have said what goods they find in the garnishee's hands, judgment will be entered for an appraisement. If the garnishee does not produce the goods to the officers who are to appraise the goods, they return an elongavit. Then, "a jury must be sworn to inquire of the value of the goods found by the former jury to be in the garnishee's hands, and judgment must be entered for the value according to the verdict of such jury." Then the manner of waging law or pleading is described; and then, after judgment is obtained by the plaintiff against the garnishee, and the plaintiff has found his sureties, "execution will be granted against *the garnishee* for the moneys." "If the garnishee fail to appear as he ought, he is taken by default for want of appearing, and judgment given against him for the goods or money attached in his hands; and he is remediless at common law or in equity by reason of his non-appearance, though he hath not one penny in his hands, and, *if taken in execution, must pay the money or go to prison.*" And,

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when the lists of fees already mentioned (and which are to be found at pp. 459 et seq. of the Privilegia Londini) are looked at, it will be seen that, though fieri facias was a common process against the goods of an ordinary defendant, no such process is mentioned as to a garnishee. On the contrary, the fees for execution where the judgment is for a debt due from the garnishee, are said to be "for *satisfaction*." It is clear from the Privilegia Londini, that, at the date of that book, where a debt was due from a garnishee, execution was by capias only, and that there could be no fieri facias against the garnishee's goods.

The learned work of Mr. Brandon cannot be accepted as authority: but, if reference be made to those portions of his book where he speaks of the judgment of appraisement and sets out the precept against the garnishee (pp. 95, 167), it seems clear that he too was unaware that a writ of fieri facias against the goods of the garnishee formed any part of the custom. Furthermore, it is clear that, if the garnishee wished to contest the matter with the plaintiff, he could do so in two ways only, by wager of law, or by pleading, and that, if he pleaded, *he must find bail.* Both procedures are entirely unsuited to the case of a corporation.

On this point none of the authorities to which we were referred, and none which we have been able to find, extend or vary the custom as stated and limited in the manner just described. *Andrews* v. *Clerke* (1), Viner's Abridgment, Customs of London (K.), Comyns's Digest, Attachment (A.), *Westoby* v. *Day* (2), and *Cox* v. *Mayor of London* (3), contain various statements of or relating to the custom: and in none of them is there any suggestion that fieri facias against the garnishee's goods formed any part of it. The reasoning of Mr. Justice Willes in the case last cited assumes that the procedure is against the person only. No argument, moreover, in favour of the custom as now claimed can be drawn from the language of recent legislation. The garnishee clauses of the Common Law Procedure Act create a different procedure, which, as it is created, so it is limited, by the very words of the statute. And an argument strong, though perhaps not conclusive, against the present claim arises from the language

(1) Carth. 25.

(2) 2 E. & B. 605, 618; 22 L. J. (Q.B.) 418.

(3) Law Rep. 2 H. L. 239.

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of 32 & 33 Vict. c. 62, s. 39, which, in abolishing imprisonment for debt, makes an exception in favour of the custom of foreign attachment; an exception unnecessary if in addition to the capias against the body of the garnishee, of which this enactment assumes the legality, there could also have been by the custom a fieri facias against his goods. Nor is the case of *Day* v. *Paupierre* (1), when it comes to be examined, any authority to the contrary. That case decides only that foreign attachment is not a proceeding against the person *of the defendant*, and therefore that it is not affected by 1 & 2 Vict. c. 110, which abolished arrest on mesne process. It does not appear to have been even suggested on the argument that it was not a proceeding against the person of *the garnishee*.

It has been pointed out already that no statement of the custom in any authority which has been brought before us contains the matters on which reliance is here placed. There are, however, cases in which it has been stated that for some purposes at least corporations are within the custom. But the authorities are neither uniform nor clear. It is reported to have been held in the *Merchant Adventurers' Case* (2) "that the custom of foreign attachment in London might extend to attach the goods of a corporation, where the corporation were indebted and had goods in the hands of others." In the *Hamburgh Company's Case* (3), where an attachment had been granted of debts owing to the company in the hands of fourteen several persons, the same Court (the Common Pleas) and the same Lord Chief Justice (North) said, "We are not judges of the customs of London, nor do we take upon us to determine whether a debt owing to a corporation be within the custom of foreign attachment or not. This we adjudge and agree in, that it is not unreasonable that a corporation's debt should be attached." These cases are some sort of authority for saying that, if a corporation were sued as defendant, and did not appear (no process existing, as has been shewn, to compel their appearance), the plaintiff might surmise that the corporation had goods in the hands of a garnishee, and, judgment being given for an appraisement, a corporation might thus be forced into the Lord Mayor's court as defendant.

(1) 13 Q. B. 802; 18 L. J. (Q.B.) 270.

(2) Freem. 207.

(3) 1 Mod. 212.

These cases are difficult to reconcile with the practice as stated in the books of authority to which reference has been made. But, at the utmost, they decide what has been pointed out, and are no authority for saying that, where a corporation are indebted to a defendant, the goods of the corporation can be seized under a writ of fieri facias. Besides, these cases are directly at variance with an *Anonymous Case* in Shower (1), decided by the King's Bench in the time of Lord Jefferies, who had himself been Recorder of London, in which it is laid down in terms that "the debt of a corporation *is not attachable*, because there ought to be three capiases and a non est inventus returned." And, if the dicta in these cases are irreconcileable, as it seems they are, it is surely not unreasonable to follow that case which is entirely in accordance with the procedure as described in the Privilegia Londini and other works of authority, and to disregard those which are at variance with such procedure.

The special exemptions of the East India Company and the Bank of England (8 & 9 Wm. 3, c. 20, s. 47) by Acts of Parliament from the process of foreign attachment were naturally relied upon as an argument to shew that other corporations were not exempt from liability to it. The general principle that Expressio unius est exclusio alterius cannot indeed be questioned; but it applies with a force differing in different cases: and in this instance it seems much more reasonable to hold that the two great corporations above mentioned prevailed upon Parliament to prevent all questions as to themselves by direct enactment, than to hold that Parliament by such special enactment in these two cases meant to determine this question in all other cases adversely to corporations.

It was further contended that the words of the custom, as stated so far back as the time of Edward IV., were large enough to include, according to well-known legal interpretation, corporations within them, as they have been held to be included in the words "inhabitants or occupiers" in the first Poor Law of the 43 Eliz. c. 2; and that general customs such as this may, to use the words of Lord Holt in *City of London* v. *Vanacre* (2), be extended to new things which are within the reason of those customs. Both pro-

(1) 2 Show. 373. (2) 1 Ld. Raym. 496; 12 Mod. 271.

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positions are, no doubt, generally true. But this is a question of interpretation, and of fact: and, if the custom be one which in the very nature of its procedure cannot apply to corporations, then the words describing it cannot (though in other circumstances with other connections they might) include them. If also corporations, from the impossibility of applying it to them, were not originally within the reason of the custom, neither can it be extended to them, if they were (which they are not) new things. This, too, is a custom not favored by the Courts. Lord Nottingham, in *Cordroy's Case* (1), strongly and expressly disapproved of it: and Mr. Justice Willes, in the judgment so often referred to, in the House of Lords, for cogent reasons there set out, did not hesitate to say that both the Courts and the legislature disliked it.

We, think, therefore, that the debt of a corporation cannot be attached according to the custom; nor can there be a writ of fieri facias against their goods, as garnishees. The third plea, therefore, is bad. All the reasoning except that arising out of the issuing of the fieri facias is as applicable to the fourth plea as to the third, and that plea therefore is also bad. It thus becomes unnecessary to discuss the goodness of the replication, the badness of which indeed was not very seriously contended before us. And, upon the whole, there will be judgment for the plaintiffs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Clarke, Sons, & Rawlins.*
Solicitor for defendants: *The City Solicitor.*

(1) Freem. 312.

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Nov. 2.

Common Carrier—Liability of a Ship-owner who carries Goods generally for Hire from a Port within to a Port without the Realm—Act of God.

To bring a person within the definition of a "common carrier," he must exercise the business of carrying as a public employment; he must undertake to carry goods for all persons generally; and he must hold himself out, either expressly or by course of conduct, as ready to engage in the transportation of goods for hire, as a business, not merely as a casual occupation pro hac vice.

Every ship-owner or master who carries goods on board his vessel for hire is, in the absence of express stipulation to the contrary, subject, by implication, by the common law of England, adopting the law of Rome, by reason of his acceptance of the goods to be carried, to the liability of an insurer, except as against the act of God or the Queen's enemies. It is not only such ship-owners as have made themselves in all senses common carriers who are so liable; but all ship-owners who carry goods for hire,—whether inland, coastwise, or abroad, outward or inward: all are within the exception to the general law of bailments.

Therefore, where the owner of a line of steamers advertized to carry goods from a port within to a port without the realm received goods to be carried for hire upon that voyage, his liability to the ordinary responsibilities of a common carrier according to the custom of the realm was held to attach at whatever period of the voyage a loss might occur.

The defendant, who held himself out as a carrier by sea from London to Aberdeen, received from the plaintiff in London a mare to be carried to Aberdeen for hire. In the course of the voyage,—whether within the limits of the realm or without was left uncertain,—the ship encountered rough weather, and the mare, without any negligence on the part of the defendant's servants, but partly by reason of more than ordinary bad weather, and partly by reason of fright and consequent struggling of the mare herself, was injured to such an extent that she died:—

Held, that the defendant was liable as an insurer, this not being a loss by the act of God, not because he was a common carrier, but because he carried the plaintiff's mare in his ship for hire.

A damage or loss may be said to have been occasioned by the act of God where it has been caused directly and exclusively by such a direct and violent and sudden and irresistible act of nature as the carrier could not by any amount of ability foresee, or, if he could foresee it would happen, could not by any amount of care and skill resist, so as to prevent its effect.

Review on appeal 1 Q.B.D. 423 C.A.

This was an action against the defendant as secretary of a company who advertised a line of steamers to run between London and Aberdeen for the conveyance of passengers and goods, to recover damages for the loss of a mare.

The cause was tried before Brett, J., at the sittings in London after Hilary Term, 1874, when a verdict was entered for the de-

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fendant, leave being reserved to the plaintiff to move to enter the verdict for him upon certain findings of the jury. In the following Easter Term a rule nisi was granted, against which cause was shewn in Easter Term, 1875.

The facts and arguments are fully stated in the judgment.

Holl and *Douglas Walker*, for the defendant, referred to the following authorities:—*Liver Alkali Co.* v. *Johnson* (1); *Morse* v. *Slue* (2); the judgment of Lord Holt in *Coggs* v. *Bernard* (3); Jones on Bailments, 103; Story on Bailments, §§ 489, 523, 900; Angell on Carriers, §§ 149, 150, 151, 154, 155, 158; *Lane* v. *Cotton* (4); Abbott on Shipping, 8th ed. 345, 382; *Pickering* v. *Barclay* (5); *Barclay* v. *y Gana* (6); *Lavaroni* v. *Drury* (7); M'Lachlan on Shipping, 337; Bacon's Abridgment, Carriers; *Benett* v. *Peninsular and Oriental Steam Boat Co.* (8); *Crouch* v. *London and North Western Ry. Co.* (9); *Forward* v. *Pittard* (10); *Pianciani* v. *London and South Western Ry. Co.* (11); *Amies* v. *Stevens* (12); *Trent and Mersey Navigation Co.* v. *Wood* (13); *Smith* v. *Shepherd* (14); *Oakley* v. *Portsmouth and Ryde Steam Packet Co.* (15); *Colt* v. *M'Mechen* (16); Parsons on Shipping, ed. 1869, c. 7, p. 253; *Kendall* v. *London and South Western Ry. Co.* (17); *Blower* v. *Great Western Ry. Co.* (18); *Laurie* v. *Douglas* (19); *Notara* v. *Henderson* (20); *Grill* v. *General Iron Screw Colliery Co.* (21)

Cohen, Q.C., and *Lanyon*, for the plaintiff, relied upon the judgment of the Court of Queen's Bench in *Lloyd* v. *Guibert.* (22)

Cur. adv. vult.

(1) Law Rep. 7 Ex. 267; in error, 9 Ex. 338.
(2) 3 Keb. 72, 112, 135; 1 Ventr. 190, 238; 1 Mod. 85; 2 Lev. 69.
(3) 2 Ld. Raym. 909; 1 Salk. 26.
(4) 1 Ld. Raym. 646, 653.
(5) 2 Roll. Abr. 248; Sty. 132.
(6) 3 Doug. 389.
(7) 8 Ex. 166; 22 L. J. (Ex.) 2.
(8) 6 C. B. 775; 18 L. J. (C.P.) 85.
(9) 14 C. B. 255; 23 L. J. (C.P.) 73.
(10) 1 T. R. 27.
(11) 18 C. B. 226.
(12) 1 Str. 127.
(13) 3 Esp. 127; 4 Doug. 287.
(14) Abbott on Shipping, 11th ed. 338.
(15) 11 Ex. 618; 25 L. J. (Ex.) 99.
(16) Johns. Rep. (N.Y.) 160.
(17) Law Rep. 7 Ex. 373.
(18) Law Rep. 7 C. P. 655.
(19) 15 M. & W. 746.
(20) Law Rep. 5 Q. B. 346; in error, 7 Q. B. 225.
(21) Law Rep. 1 C. P. 600; in error, 3 C. P. 476.
(22) Law Rep. 1 Q. B. 115.

Nov. 2. The judgment of the Court (Brett and Denman, JJ.,) was delivered by

BRETT, J. In this case, tried before me in London, the plaintiff delivered to the defendant's company in London, a mare to be carried by steamer to Aberdeen. The defendant's company advertised and habitually ran a line of steamers from London to Aberdeen. The mare was shipped without any bill of lading. At a part of the voyage, which was not determined by the evidence, the mare, during rough weather, was injured, and to such an extent that she died. There was a conflict of evidence as to the amount of care and skill exercised by the defendant's servants, and as to the conduct of the mare. The jury were asked,—

1. Was the injury to the mare caused by negligence of the defendant's servants, either in preparing for bad weather or in attempting to save the mare from the consequences of bad weather? Answer, No.

2. Or, was the injury caused solely by the conduct of the mare herself by reason of fright and consequent struggling, without any negligence of the defendant's servants? Answer, No.

3. Or, was the injury caused solely by the perils of the sea, i.e. by more than ordinary rough weather, without any negligence of the defendant's servants or any fright and consequent struggling of the mare? Answer, No.

4. Or, was it caused partly by more than ordinary bad weather, and partly by the conduct of the mare herself by reason of fright and consequent struggling, without any negligence of the defendant's servants? Answer, Yes. The jury were further asked,—

5. Were there any known means, though not ordinarily used in the carriage of horses by people of ordinary care and skill, by which the defendant could have prevented the injury to the mare? This question the jury did not answer.

Upon the answers of the jury, a verdict, for the purpose of the day, was directed to be entered for the defendant, the plaintiff having leave to enter a verdict for him on the findings of the jury, if upon such findings the Court should be of opinion that he was entitled to judgment.

Upon a rule granted to shew cause, it was admitted on behalf of the defendant, that, if the whole voyage had been within the

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realm of England, the defendant would have been deemed to be a common carrier according to the custom of the realm, because he advertised to carry any persons' goods from place to place: but it was argued that, under the circumstances of the case, he could not be so deemed, because he undertook to carry to a port without the realm; and therefore a part of the voyage was beyond the realm, and could not be subject to the custom of the realm.

1 QBD 50

It was then argued that it was consistent with the evidence that the injury was caused outside the realm, and therefore that the liability in respect of such injury could not be regulated by the custom of the realm. It was also contended that, the peril of the sea which caused the injury, being the result of more than ordinary bad weather, that is to say, of weather not to be expected in an ordinary voyage, was, if the case was to be decided upon a carrier's liability according to the custom of the realm, the act of God within the meaning of that exception to a carrier's liability; and, further, that the injury having happened partly through the conduct, from its inherent nature, of the mare, the defendant could not be held responsible.

It was urged for the plaintiff, that the defendant, by advertising that he would carry the goods of any person from place to place, undertook the responsibilities of and became a common carrier according to the custom of the realm of England; that this would be so in the case of any persons so advertising in England, and would be so in the case of any British ship-owner so advertising anywhere; that the circumstance of one of the termini of the proposed voyage being outside the realm did not alter the liabilities; that, even if the defendant was not a common carrier, yet he was a ship-owner carrying goods on board ship, as matter of trade, for hire, and ship-owners so carrying goods are, by the custom of the realm, responsible as insurers for the safety of the goods to the same extent as common carriers are responsible; that the perils of the sea which caused the injury in this case were not the act of God within the meaning of the exception to the complete liability of a common carrier or a carrier by ship of goods for hire, for that an injury can only be said, within the meaning of that exception, to have been occasioned by the act of God, when

it has been occasioned directly and not indirectly by the extraordinary action of some physical force the consequences of which could not be averted, or by some unexpected and extraordinary natural occurrence which human foresight could not foresee nor human power resist or prevent, whereas there was in the present case a sea more rough indeed than on an ordinary voyage, that is to say, a peril of the sea, but nothing more; that the natural fright of the mare caused by the more than ordinary rough weather was not an inherent vice of the mare which could absolve the defendant from liability for the injury to the mare.

This case was elaborately argued before my Brother Denman and myself. The main question treated was, the principle on which the liability of the defendant, if any, ought to rest. It was urged on behalf of the defendant that his liability cannot be made to rest on an allegation that he was a common carrier, because, it was said, that liability is imposed by a custom of the realm, and such a custom cannot have force beyond the realm, and the defendant has a right to assume in the present case that the injury to the mare happened beyond the realm.

But, the phrase "by the custom of the realm" is in truth only a paraphrase for "by the common law." Thus, in Selwyn's Nisi Prius, tit. Carriers, c. 10, it is said: "And by 'the custom of the realm,' that is, by 'the common law,' &c." And Story on Bailments, § 469: "The general principles of the Roman and foreign law upon the subject have been stated somewhat more at large, because they form a proper introduction to the doctrine of *the common law* upon the subject, in which the responsibility of innkeepers is said to be founded on *the custom of the realm*, because in point of fact the origin of the latter may be clearly traced up to the Roman law, from which *the common law*, without any adequate acknowledgment, has from time to time borrowed many of the important principles which regulate the subject of contracts." And, in *Forward* v. *Pittard* (1), Lord Mansfield says: "But there is a further degree of responsibility 'by the custom of the realm,' that is, 'by the common law.'" In *Crouch* v. *London and North Western Ry. Co.* (2), Jervis, C.J., says: "When a party who holds himself out as a common carrier accepts goods, 'the common law,' that is,

(1) 1 T. R. 27. (2) 14 C. B. 255; 23 L. J. (C.P.) 73.

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'the law founded on the custom of the realm,' ingrafts upon such acceptance a contract to carry safely and to insure, subject only to two exceptions, viz. the act of God and the Queen's enemies." The question, therefore, is one of contract, and depending upon the nature of the undertaking to be implied by the common law of England. The contract is obviously made at the time of the receipt of the goods for carriage. If that receipt be in England, on board an English ship, the whole contract must be construed according to English law. If it be abroad by an English master on board an English ship, it is still an English contract, because it is a contract made under the English flag: *Lloyd* v. *Guibert* (1): and therefore in that case also the question is, what is the undertaking to be implied on the part of the ship-owner by the common law of England. The question being one of contract, there is no principle of law which forbids the implication of a promise to carry safely beyond as well as within the realm. The reason of the implied promise, given by Lord Holt in *Coggs* v. *Bernard* (2), and by Best, C. J., in *Riley* v. *Horne* (3), founded on the reason on which the Prætor allowed the exceptional liability of ship-masters, inn-keepers, &c., applies at least quite as strongly to the part of the carriage by sea beyond the realm as to the part within it. There is no ground on which to imply a different extent of undertaking in the same contract for the carriage which is beyond the realm from that which is within it. On principle, therefore, the same promise should be implied for the whole carriage, whether the whole be within the realm or part be within and part without. *Morse* v. *Slue* (4) has always been treated as a decision that the same promise is implied where the ship is to go beyond sea as where she is always within the realm. And so has *Goff* v. *Clinkard*, quoted in *Dale* v. *Hall.* (5) *Crouch* v. *London and North Western Ry. Co.* (6) is precise to the same effect. And Kent, C. J., in *Elliott* v. *Rossell* (7), lays it down in the strongest terms, that "Masters and owners of vessels are liable as common carriers on the high seas as well as in port; and the argument of the ingenious counsel

(1) Law Rep. 1 Q. B. 115.
(2) 2 Ld. Raym. 909; 1 Salk. 26.
(3) 5 Bing. 217.
(4) 2 Lev. 69; 1 Vent. 190, 238; 1 Mod. 85; 3 Keb. 72, 112, 135.
(5) 1 Wils. 281.
(6) 14 C. B. 255; 23 L. J. (C.P.) 73.
(7) 10 Johns. Rep. (N.Y.) 1, 7.

for the defendant is not well supported in the position that the doctrine of common carriers is by the common law of England to be confined to cases of transportation by water within the jurisdiction of the realm. All the books and all the cases which touch this subject lay down the rule generally, and apply it as well to shipments to or from a foreign port as to internal commerce." "If the master be chargeable as a common carrier for goods received to be transported beyond sea, it would seem to be very extraordinary and idle for the law to regard him in that character only from the time that the goods were received on board until he had put to sea, and to regard him, when coming from abroad, as common carrier only from the time that he entered within the jurisdiction of the port. There is no colour of such a limitation of the rule."

It seems to us that there is no answer to this reasoning. In all these cases the undertaking or promise is treated as one and indivisible. And we are of opinion that, whether the promise is to be implied only in ships which are held out as common carriers or in all ships which carry goods for hire, the promise or undertaking to be implied is, both on principle and authority, one and indivisible, and applies precisely to the same extent to a loss occurring in the part of the voyage beyond the realm as to one occurring in the part within the realm. If, therefore, it is right to say that the liability of insurance attaches to a ship-owner because he holds himself out to be a common carrier, the defendant, who did so hold himself out, was subject to the ordinary liability of common carriers, and could not, in the absence of any other defence, absolve himself on the ground that he may assume that the mare was injured beyond the realm. That some ship-owners so conduct their business as to be within the definition of common carriers, and to be properly so treated in every respect, is clear. It was so stated in *Morse* v. *Slue* (1) and in *Coggs* v. *Bernard* (2), and has been in a multitude of other cases. A general ship is, by the mere fact of her being so put up, made in all respects a common carrier, though she is going to a foreign port: *Barclay* v. *y Gana* (3);

(1) 2 Lev. 69; 1 Vent. 190, 238; 1 Mod. 85; 3 Keb. 72, 112, 135.

(2) 2 Ld. Raym. 909; 1 Salk. 26.

(3) 3 Doug. 389.

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Lavaroni v. *Drury*. (1) It would be sufficient, therefore, in the present case to say that the defendant was a common carrier, and therefore at all events subject to the liabilities of common carriers according to the common law.

But it was argued strongly that this is not the real ground of the liability in the case of ship-owners; that some ship-owners who carry goods for hire are not common carriers, and yet are, in the absence of express contract, liable to the same extent as common carriers; that, in fact, all ship-owners who carry goods for hire, whether they be common carriers or not, are in the absence of express contract made liable by implication by the common law to insure the safe carriage and delivery of the goods intrusted to them, except against the act of God, or the Queen's enemies; that the true ground of such liability in the case of ship-owners is not that they are common carriers, but that they are ship-owners carrying goods for hire.

It is not absolutely necessary, as we have pointed out, to determine this question in this case. But it is obviously one of great importance; and, as it was made a main point of argument, and was most ably argued, we think it right to give our judgment on it.

In order to determine whether there may not be some ship-owners who carry goods for hire, and who nevertheless are not common carriers, we should determine exactly what it is that makes a man a common carrier. "It is not every person who undertakes to carry goods for hire that is deemed a common carrier. A private person may contract with another for the carriage of his goods, and incur no responsibility beyond that of an ordinary bailee for hire, that is to say, the responsibility of ordinary diligence. To bring a person within the description of a common carrier, he must exercise it as a public employment; he must undertake to carry goods for persons generally; and he must hold himself out as ready to engage in the transportation of goods for hire, as a business, not as a casual occupation pro hac vice. A common carrier has therefore been defined to be one who undertakes for hire or reward to transport the goods of such as choose to employ him from place to place:" Story, § 495. In

(1) 8 Ex. 166; 22 L. J. (Ex.) 2.

Fish v. *Chapman* (1) it is held, in what we venture to call a powerful and business-like judgment, that is, well applying the principles of law to the business of the country, that, "to constitute a man a common carrier, the business of carrying must be habitual, and not casual. The undertaking must be general, and for all people indifferently. He must assume to be the servant of the public; he must undertake for all people." "When it is said that the owners and masters of ships are deemed common carriers, it is to be understood of such ships as are employed as general ships or for the transportation of merchandize for persons in general, such as vessels employed in the coasting-trade, or in general freighting business for all persons offering goods on freight for the port of destination:" Story, § 501.

The real test of whether a man is a common carrier, whether by land or water, therefore, really is, whether he has held out that he will, so long as he has room, carry for hire the goods of every person who will bring goods to him to be carried. The test is not whether he is carrying on a public employment, or whether he carries to a fixed place; but whether he holds out, either expressly or by a course of conduct, that he will carry for hire, so long as he has room, the goods of all persons indifferently who send him goods to be carried. If he does this, his first responsibility naturally is, that he is bound, by a promise implied by law, to receive and carry for a reasonable price the goods sent to him upon such an invitation. This responsibility is not one adopted from the Roman law on grounds of policy: it arises according to the general principles which govern all implied promises. And his second responsibility, which arises upon reasons of policy, is, that he carries the goods upon a contract of insurance. This policy has fixed the latter liability upon common carriers by land and water, not because they hold themselves out to carry for all persons indifferently; if that were all, there would be no ground for the policy, it would be without reason; many other persons hold themselves out to act in their trade or business for all persons indifferently who will employ them, and the policy in question is not applied to such trades; the policy is applied to the trade of common carriers, because, when the common law

(1) 2 Kelly's (Georgia) Rep. 349.

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adopted that policy, the business of common carriers in England was exercised in a particular manner and subject to particular conditions which called for the adoption of that policy. The question is, whether the policy has not been applied, not only to ship-owners who are by their own act common carriers, but also to ship-owners who are not common carriers. Whether a ship-owner is or is not a common carrier must surely, upon principle, as from the cases and writings just quoted it appears to be on authority, depend upon whether the ship-owner holds himself out to carry for hire for all persons who may offer. But certainly many ship-owners do not in fact do so. A ship-owner who puts his ship into a broker's hands to procure a charter does not hold himself out to carry for the first person who offers. Neither does a master who in a foreign port advertises that he is ready to enter into charters. The ship-owner or master has a right to consider the credit and responsibility of the proposed charterer, and to reject his proposal if it be thought expedient. One who puts up his ship as a general ship does, by so doing, by the ordinary understanding of ship-owners and merchants, hold himself out as ready to carry all reasonable goods brought to him. And so does a ship-owner who runs a line of ships from ports to ports, habitually carrying all goods brought to him. It is admitted, therefore, that such are common carriers, and liable to all the implied undertakings of common carriers. The question is, whether other ship-owners carrying goods for hire without express stipulation, though they are not liable to all the implied undertakings of common carriers, are not by the common law, for reasons of policy, made also liable to one of those implied undertakings.

The solution of this question will, we think, depend upon a consideration of the time at which and the reason for which the liability in question was introduced into the common law. No one who has read the treatise of Mr. Justice Story on Bailments, the essay of Sir William Jones, and the judgment of Lord Holt in *Coggs* v. *Bernard* (1), can doubt that the common law of England as to bailments is founded upon, though it has not exactly adopted, the Roman law. It is true that Lord Holt rests as for authority solely on Bracton: but the treatise of Bracton adopts

(1) 2 Ld. Raym. 909; 1 Salk. 26.

all the divisions of the Roman law in the very words of the Roman text, and further adopts the exception of the Roman law and the Roman reasons for it. The divisions may be the logical divisions of the subject, and so be naturally adopted by all in every country who treat the subject logically: but the exception, both in the Roman Empire and in England, was no natural exception, but one depending entirely on public policy, arising from the manner in which some particular kinds of business were carried on in both places. It is obvious, therefore, that Bracton, or English judges before him, adopted into the English the Roman law.

By the primary divisions of the law of bailment in the Roman law and as enunciated by Lord Holt, those who carry goods for hire are, unless they are within the exception alluded to, liable only as other bailees for hire, that is to say, they are bound to ordinary diligence and to a reasonable exercise of skill, and, of course, are not responsible for any losses not occasioned by the ordinary negligence of themselves or their servants,—Story, § 457: but those who are within the exception are liable as insurers, &c.

The question, therefore, is, what ship-owners are brought within the exception. That exception was in the Roman law contained in the well-known edict of the Prætor; and the reason for its promulgation was contained in the Commentary of Ulpian: "Ait Prætor, nautæ, caupones, stabularii, (1) &c.,"—that is to say, ship-masters and the class of persons who carried on the business of inn-keepers. If the proposition contained in the exceptional edict is to be considered as adopted straight and in terms into the common law, it is not some ship-masters, but all ship-masters, who are by the terms of it made liable to the greater liability. Carriers, it will be observed, are not mentioned; and certainly not a limited

(1) The word "stabularii" here is evidently used in the second sense given for it in Facciolati and Forcellini's Lexicon (sub verbo), "Qui mercede *homines eorumque* jumenta hospitio excipit." Passages from Ulpian, Seneca, and Apuleius clearly shewing that the word was used to describe a person almost identical in character with a modern inn-keeper, are cited by the authors, who add to the above definition the remark "nam stabulum tum ad jumenta pertinet, tum ad homines." See Bailey's edition, 1828.—Note by Denman, J.

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class of carriers called afterwards "common carriers." "The Roman edict," says Story, "it will be at once perceived, does not extend in terms to carriers by land. But, in most, if not in all modern countries, the rule which it prescribes has been practically expounded so as to include them:" § 458.

It required, of course, authority, customary and thence judicial, or parliamentary, to introduce into the common law the original rules and the exception as applicable to *any* case. But, if the exception was to be introduced at all, to what would it naturally be at first applied? It would seem that naturally it would first be applied to the trades or businesses which were carried on in England under the same names and conditions as formerly in the Roman Empire. Modern inn-keepers probably carry on the same business as both the stabularii and caupones did in the older time. The two trades, therefore, carried on in England under the same conditions as the three enumerated in the edict, were, the ship-masters and innkeepers. The conditions which had induced the Prætor as matter of policy to hold them to a strict liability in Rome were the same conditions as existed in the mode of carrying on the same business in England. The conditions on which the Prætor had acted with regard to ship-masters were not conditions confined to a certain limited portion of ship-masters: those conditions existed in the case of all ship-masters. When, then, the English judges, acting at first no doubt on the general understanding of all merchants and ship-owners, adopted into the common law the exception of the Roman law, there is no reason which can be suggested why they should not and did not adopt it in its terms, as applicable, not to a limited portion of, but to all ship-masters carrying goods for hire. Afterwards, according to the ordinary course of English law, the judges would have to consider whether some other trade or business was not to be in England introduced into the exception, because such trade was so carried on as to be within the principle of the exception. They found a trade established in England, viz. the trade of "common carriers," which was so carried on, by reason of the state of the country, as to be within the principle or conditions of the exception, and therefore they added that trade to those already within the exception. Common carriers would not be introduced because

they carried the goods of all persons indifferently, but because those who so carried goods at that time were within the mischief dealt with by the Prætor. If this be a true view, ship-masters and ship-owners were not introduced because they were common carriers, but because they were ship-masters and ship-owners, and therefore all ship-masters and ship-owners were comprised in the exception when first it was recognised or introduced by judicial decisions. Common carriers by land were added afterwards, because their business was subject to the same conditions as was the business of all carrying ship-masters and ship-owners.

Many attempts have been made to introduce into the exception other trades, as, those of wharfingers, forwarding agents, carters, &c.; but all such attempts have failed, because those trades, although, in respect of their being public or common trades, they are similar to the trade of common carriers, are not similar to it in those respects in which it was similar to the trades of ship-masters and innkeepers. Unless there is something in the authorities which binds us to determine that only such ship-owners as made themselves common carriers were brought within the exception, reason and consideration seem to us to shew that all ship-masters and owners carrying goods for hire were from the beginning brought within it. Innkeepers were probably judicially declared to be within it first in *Calye's Case.* (1) Ship-owners were first judicially declared to be within it in *Morse* v. *Slue.* (2) The facts of that case, as stated in the special verdict in 1 Ventris, p. 190, lead, one would think, strongly to the conclusion that the ship was a general ship: but, as has been observed by Blackburn, J., in *Liver Alkali Co.* v. *Johnson* (3), the count is general and states that, "according to the law and custom of England, masters and governors of ships *which go from London beyond sea and take upon them to carry goods beyond sea*, are bound to keep safely," &c. This statement is certainly in terms applicable to all ships, and not only to ships acting as common carriers; and therefore the case has generally been considered as a decision upon the liability of all ships. So, in *Dale* v. *Hall* (4), the declaration was

(1) 8 Co. Rep. 32. a.

(2) 2 Lev. 69; 1 Vent. 190, 238; 1 Mod. 85; Keble, 72, 112, 135.

(3) Law Rep. 9 Ex. 341.

(4) 1 Wils. 281.

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not against the defendant as a common carrier, but upon a promise to be implied from the fact of his being a ship-master receiving goods to be carried for hire. So, in *Goff* v. *Clinkard*, quoted in *Dale* v. *Hall* (1), there is no statement whatever that the ship was a general ship. We think it worthy of notice that Lord Holt, in the careful judgment in *Coggs* v. *Bernard* (2), in which his words would be well weighed, speaks thus: "And this is the case of the common carrier, common hoyman, master of a ship," &c. He does not include the ship-master in the class of common carriers. He treats him as a separate and independent class. And, speaking of him, he uses a phrase which includes all ship-masters, and does not confine the class to those ship-masters only who trade as common carriers. Blackburn, J., treats the case of *Lyon* v. *Mells* (3) as a strong authority in favor of the enlarged liability of a barge-owner, without determining whether such barge-owner was a common carrier or not. And the judgment of the majority of the judges in *Liver Alkali Co.* v. *Johnson* (4) seems to be a strong authority in favour of the liability being attached to all ship-masters or owners carrying goods for hire, by reason of their decision that the defendant in that case was liable, without determining whether he was a common carrier or not. In *Barclay* v. *y Gana* (5), it is true that the ship was a general ship: but Lord Mansfield does not decide the case on the ground that the defendant was a common carrier. He says: "It is impossible to distinguish this case from the case of a common carrier." In Bell's Commentaries, c. iv. par. 14, p. 157, it is said: "As to particular ships freighted specially, unless there be a specific agreement, the edict applies." In *Schieffelin* v. *Harvey* (6), it seems impossible to say whether the ship was a general ship. There was a bill of lading; but that does not determine the point. The judgment is, however, general: "The master and owners are responsible for every injury that might have been prevented by human foresight or energy." The judgment of Kent, C.J., in *Elliott* v. *Rossell* (7), is also as strong and general as can be: "In short," he says, "it

(1) 1 Wils. 282.
(2) Ld. Raym. 909; 1 Salk. 26.
(3) 5 East, 428.
(4) Law Rep. 9 C. P. 338.
(5) 3 Doug. 389.
(6) 6 Johns. Rep. (N.Y.) 170.
(7) 10 Johns. Rep. (N.Y.) 1.

must be regarded as a settled point in the English law, that masters and owners of vessels are liable, in port and at sea and abroad, to the whole extent of inland carriers, except so far as they are exempted by the exceptions in the contract of charter-party or bill of lading, or by statute." Certainly, these are terms which seem to shew that, in the mind of the Chief Justice, all masters of all sea-going vessels were so liable, and not only those who had made themselves common carriers, and thereby liable to carry the goods of all persons. And it seems impossible to account for the almost universal use of bills of lading by all sea-going ships, if a great number of them, viz. all who were not common carriers, would only be answerable for negligence, for which they are answerable notwithstanding the bill of lading. The exceptions in a bill of lading are exceptions out of a generally recognized absolute liability which it is generally considered *would* exist if those exceptions were not inserted.

We are, therefore, of opinion that the true rule is, that every ship-owner or master who carries goods on board his vessel for hire, is, in the absence of express stipulation to the contrary, subject, by implication, by the common law of England, adopting the law of Rome, by reason of his acceptance of the goods to be carried, to the liability of an insurer, except as against the act of God, or the Queen's enemies. It is not only such ship-owners as have made themselves in all senses common carriers who are so liable; but all ship-owners who carry goods for hire, whether inland, coastwise, or abroad, outward or inward. They are all within the exception to the general law of bailments, which (as before observed) was adopted into the common law from the Roman law. The liability of the defendant, therefore, was that of an insurer, except against the act of God and the Queen's enemies; not because he was a common carrier, but because he carried the plaintiff's mare in his ship for hire.

We should take notice that our view differs from some few passages in Story, as in § 501, and in § 504. But the note to § 501 seems to intimate a doubt, after all, whether the section is correct; and the cases quoted in support of § 504 do not affect the question now before us.

We have next to determine whether the loss in this case can be

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said to have occurred "by the act of God." Many definitions of this phrase have been attempted. Many cases have decided what occurrences cannot in law be considered to come within it. The matter is fully treated in Story, § 511, and the notes to it; and in Angell on Carriers, §§ 154, 155, and subsequent sections. The definition to be extracted from all the cases is said to be best given in a note on *Coggs* v. *Bernard* (1), in the American edition (by Mr. Wallace) of Smith's Leading Cases. The best form of the definition seems to us to be, that the damage or loss in question must have been caused directly and exclusively by such a direct and violent and sudden and irresistible act of nature as the defendant could not by any amount of ability foresee would happen, or, if he could foresee that it would happen, could not by any amount of care and skill resist, so as to prevent its effect. It lies upon the defendant to shew that a damage or loss for which he would otherwise be liable is brought within this exception.

We cannot say, notwithstanding the inability of the jury to agree to an answer to the fifth question left to them, that the defendant has in this case satisfied the burden of proof cast upon him, so as to bring himself clearly within the definition. It seems to us impossible to say that no human ability could foresee the reasonable probability of the happening of rough weather on the voyage, and that a horse at sea might be frightened by it, or that no human ability could prevent injury to a frightened horse in such weather as occurred.

We think also that the fright of the mare was a natural and probable result of the rough sea,—a fright likely to happen in the case of any ordinary horse,—and cannot be considered such a vice in the inherent nature of this particular mare as to absolve the defendant.

We are therefore of opinion that the plaintiff was entitled to succeed, and that the rule must be made absolute to enter the verdict for him.

Rule absolute.

Solicitors for plaintiff: *Lawrence, Plews, & Boyer.*
Solicitors for defendant: *Lyne & Holman.*

(1) 2 Ld. Raym. 909; 1 Salk. 26.

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Sale of Timber—Interest in Land—Actual Receipt of Part of Goods Sold—Statute of Frauds, ss. 4, 17.

A sale of growing timber to be taken away as soon as possible by the purchaser is not a contract or sale of land, or any interest therein, within the 4th section of the Statute of Frauds.

The defendant by word of mouth purchased certain growing trees for 26*l.* of the plaintiff on the terms that he, the defendant, should remove them as soon as possible. The defendant accordingly cut down some of the trees and agreed to sell the tops and stumps to a third person. The plaintiff then countermanded the sale, and prohibited the defendant from cutting down the rest of the trees. The defendant, however, cut down the remainder, and carried the whole away:—

Held, that the case was within the 17th section of the Statute of Frauds, and that before the sale was countermanded there was an acceptance and actual receipt of part of the goods sold within that section.

DECLARATION: 1st count for trespass to land and cutting down certain trees of the plaintiff; 2nd, trover; 3rd for an injury to the plaintiff's reversion.

Pleas: not guilty, not possessed, leave and licence, &c., and a special plea setting forth that the plaintiff had sold to the defendant a large quantity of timber trees growing upon the land, with liberty to the defendant to go on to the land to remove the trees, and that the acts complained of were done in pursuance of the agreement, and with the privity and consent of the plaintiff. Issues thereon.

The case was heard before Amphlett, B., at the Leeds summer assizes, 1874, without a jury, when the facts were as follows:—The plaintiff was the owner in fee of a copyhold tenement on which timber was growing. The tenement was under lease, but by the custom of the manor the trees were reserved to the lessor upon a lease of copyhold tenements. The plaintiff communicated with the defendant by letter with regard to his having this timber for sale, and a question having arisen as to the number of the trees, it was arranged that they should go over the ground together to view the trees.

On the 27th of February they went accordingly, and the learned judge found that what took place between them on that

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occasion amounted to a contract by word of mouth for the sale of twenty-two trees at 26*l.*, "the trees to be got away as soon as possible." The defendant's servants entered and cut the trees upon the 2nd, 3rd, and 4th of March. When six of the trees had been cut the plaintiff wrote a letter countermanding the sale of the 27th of February, and demanding an alteration of the terms before allowing the timber to be felled. The defendant, nevertheless, felled the remainder of the trees, and, notwithstanding a notice to the contrary from the plaintiff's solicitors, subsequently removed the whole. Before receiving the letter countermanding the sale the defendant had agreed to sell the tops and stumps to a third person.

On these facts the verdict was entered for the plaintiff for 50*l.*, leave being reserved to the defendant to move to enter it for himself, on the ground that the facts disclosed a right on the part of the defendant to cut down and remove the trees.

A rule nisi had been obtained accordingly, against which

Nov. 4. *Cave, Q.C.*, shewed cause. Assuming that this contract was within the 17th section of the Statute of Frauds, and not the 4th, there was no evidence of an actual receipt of part of the subject-matter of the sale here. There was nothing to divest the vendor's lien, and so long as that remained there could be no actual receipt. [He cited on this point *Phillips* v. *Bistolli* (1); *Chaplin* v. *Rogers* (2); *Maberley* v. *Sheppard* (3); *Parker* v. *Wallis* (4); *Boulter* v. *Arnott.* (5)]

Secondly, this was a contract for an interest in land within the 4th section of the Statute of Frauds. This is not a case of a sale of fructus industriales. A contract to buy the trees as they stand, as this was, is within the statute; it is not like the case where the trees are to be reduced to timber before the property passes. If it is intended that the trees while standing in the land shall become the property of the purchaser the case is within the section. [He cited *Teal* v. *Auty* (6); *Evans* v. *Roberts* (7); *Parker* v. *Stani-*

(1) 2 B. & C. 511.
(2) 1 East, 192.
(3) 10 Bing. 99.
(4) 5 E. & B. 21.
(5) 1 C. & M. 333.
(6) 2 B. & B. 99.
(7) 5 B. & C. 829.

land (1); *Carrington* v. *Roots* (2); *Mayfield* v. *Wadsley* (3); *Scorell* v. *Boxall* (4); *Wood* v. *Manley* (5); *Winter* v. *Brockwell.* (6)]

[LORD COLERIDGE, C.J., referred to *Smith* v. *Surman.* (7)]

That case is distinguishable, because there the vendor was to cut the trees; here the purchaser is to cut them. He is to have the property in the trees while standing, and the licence given him to go on the land becomes irrevocable, because coupled with his interest in the growing timber. This amounts to an interest in land.

Wills, Q.C., *J. Thompson*, and *C. Dodd*, supported the rule. This was not a contract for an interest in land. There was to be no possession or use of the land for any specific time, nor was it to contribute to the growth of the thing sold. The contract was for the trees as chattels, to be removed as soon as possible. If a thing is sold when immature, and is to be allowed to grow, it may be that the sale is not merely of the thing as it stands, but of an increment to be derived from the land, and so there is an interest in the land forming part of the subject of the sale. Here what was sold was the thing as it stood. [They cited *Rodwell* v. *Phillips* (8), *Liford's Case.* (9)]

[The Court then intimated that they did not think it necessary to hear them further, but reserved their judgment.]

Cur. adv. vult.

Nov. 6. The following judgments were delivered:—

LORD COLERIDGE, C.J. This is an action in respect of the entry by the defendant upon certain land in the occupation of the plaintiff's tenant, and the cutting down of certain trees. The facts were these. The plaintiff was the owner in fee of a copyhold tenement on which certain timber trees were growing. The tenement was under lease, but the custom of the manor reserved the trees upon the tenement leased to the owner in fee of the copyhold tenement. The plaintiff had communicated with the defendant, a timber merchant, on the subject of his wish to sell the trees; but some

(1) 11 East, 362.
(2) 2 M. & W. 248.
(3) 3 B. & C. 357.
(4) 1 Y. & J. 396.
(5) 11 A. & E. 34.
(6) 8 East, 308.
(7) 9 B. & C. 561.
(8) 9 M. & W. 501.
(9) 11 Co. Rep. 49 (b).

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question had arisen as to the number of the trees, and it was agreed that the plaintiff and defendant should go over the land together to inspect the trees. On the 27th of February they went over the land for that purpose, and there was then a parol sale of twenty-two trees at the price of 26*l.*, and it was arranged that the trees should be "got away as soon as possible." The defendant's servants entered, and on the 2nd, 3rd, and 4th of March, they cut down the trees. On the 2nd of March, after six trees had been cut down, the plaintiff wrote countermanding the sale. The defendant had sold the tops and stumps before receipt of the letter of countermand; but, though sold before, they were not taken away until after such letter was received. If there was a valid contract for the sale of the trees, the plaintiff must fail; the trees had been sold, and the property had passed; the land was not in the plaintiff's possession, but his tenant's, and the defendant had a perfect right to do what he did. It is not denied that there was a verbal contract, and the question therefore is whether this was a contract which required to be in writing under the Statute of Frauds. If so, the defendant was in the wrong, because there was no such contract. The first question is whether this was a contract within the 4th section, as being a "contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them." These words have given rise to a great deal of discussion, and very high authorities have said that it is impossible to reconcile all the decisions on the subject. If the matter were res integra, I should be inclined to think that there was much to be said for Littledale, J.'s, view, that the words of the statute were never meant to apply to such a matter as this at all, but only referred to such interests as are known to conveyancers. It is, however, too late now to maintain this view, inasmuch as there are a great number of decisions which proceed on the opposite view. It is clear on the decisions that there are certain natural growths which, under certain circumstances, have been held to be within the words of the section, and a contract with respect to which must, therefore, be in writing. The question then is what the rule is to be. The matter has been much discussed, and for my part I despair of laying down any rule which can stand the test of every conceivable case. If it is said that there is an interest in land within the sec-

tion when the sale is of something which, before it is taken away, is to derive benefit from the land, and to become altered by virtue of what it draws from the soil, the rule is an intelligible one, but one which it is almost impossible to apply with absolute strictness. The effect of such a rule, if strictly applied, would vary at different times of the year. If the sale were in the spring, and the removal of the thing sold were to be postponed but for two or three days, it would not, at its severance, in strictness, be in the same state as it was at the time of the sale. On the other hand, in winter, when the sap is out of the tree, and it is standing, as it were, dead for the time being, there would be no appreciable change. It is almost impossible to say that the rule can be that, wherever anything, however small, is to pass into that which grows on the land, out of the land, between the sale and the reduction into possession, the contract is within the section.

I find the following statement of the law with regard to this subject, which must be taken to have received the sanction of that learned judge, Sir Edward Vaughan Williams, in the notes in the last edition of Williams' Saunders upon the case of *Duppa* v. *Mayo*, p. 395: "The principle of these decisions appears to be this, that wherever at the time of the contract it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold from further vegetation and from the nutriment to be afforded by the land, the contract is to be considered as for an interest in land; but where the process of vegetation is over, or the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the thing sold, and the contract is for goods. This doctrine has been materially qualified by later decisions, and it appears to be now settled that, with respect to emblements or fructus industriales, &c., the corn and other growth of the earth which are produced not spontaneously, but by labour and industry, a contract for the sale of them while growing, whether they are in a state of maturity or whether they have still to derive nutriment from the land in order to bring them to that state, is not a contract for the sale of any interest in land, but merely for the sale of goods." The propositions so laid down, as applied to the present case, seem to afford a very clear and intelligible rule. Planted trees

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cannot in strictness be said to be produced spontaneously, yet the labour employed in their planting bears so small a proportion to their natural growth, that they cannot be considered as fructus industriales, but treating them as not being fructus industriales, the proposition is that where the thing sold is to derive no benefit from the land, and is to be taken away immediately, the contract is not for an interest in land. Here the contract was that the trees should be got away as soon as possible, and they were almost immediately cut down. Apart from any decisions on the subject, and as a matter of common sense, it would seem obvious that a sale of twenty-two trees to be taken away immediately was not a sale of an interest in land, but merely of so much timber.

There do not seem to be any decisions which prevent our deciding in conformity with the common sense of the matter. On the contrary, there is a case of *Smith* v. *Surman* (1), in which the Court of Queen's Bench held, under circumstances very like those of the present case, that there was no contract for an interest in land. The only distinction that I can see between that and the present case, is that there the trees were to be cut by the vendor; but Littledale, J., held that, "if in that case the contract had been for the sale of the trees, with a specific liberty to the vendee to enter the land to cut them, it would not have given him an interest in land within the meaning of the statute." This decision has never been questioned, and has been adopted in subsequent decisions. It seems to me, therefore, that both common sense and authority combine to shew that this was not a contract for an interest in land within the section.

The remaining question is whether this contract was within the 17th section. This depends on whether there was here an acceptance and actual receipt of part of the goods. There have been many decisions on the question, what amounts to such an acceptance and receipt; it was very early determined that an actual manual receipt of the article sold was not necessary, but that a constructive receipt would do. Here six of the trees were cut down before the sale was countermanded, and at a time when it must be taken that that was done with the assent of the seller, and portions were sold. What more could have been

(1) 9 B. & C. 561.

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done short of actually removing the trees? These were bulky trees, that a man could not carry away like a small article. If anything short of actual manual possession could be sufficient, all was done that could be done. The defendant immediately cuts down the trees and converts them into chattels, and deals with them as owner by selling the tops and stumps. In the absence of any decision on the subject, I should have said that, if it be once admitted that anything short of actual manual possession could be a sufficient acceptance and receipt, there was amply sufficient to shew such an acceptance and receipt here. But we are not without authority on the subject. There have been repeated decisions that, where anything has been done on the part of the vendee under such a contract as this to the whole or part of the goods indicating an intention to deal with the subject-matter as owner in possession, and he is allowed by the vendor so to deal with it, that amounts to an acceptance and receipt within the statute. It has been held with regard to bulky things, that the delivery of the indicia of title was sufficient. When the purchaser had marked the goods, and left them so marked on the vendor's premises, it was held that there was a sufficient acceptance and receipt. The case of *Chaplin* v. *Rogers* (1) seems to me to be a distinct authority for the view that there was an acceptance and receipt here, the words of the section having received all the fulfilment the subject-matter was capable of. I do not rely on the circumstance that the land was in the possession of the plaintiff's tenant. It seems to me that, apart from that circumstance, and treating the land as being the vendor's, the case is clear. The result is that the plaintiff fails on both points, and the rule must be discharged.

BRETT, J. This is an action by the plaintiff for injury to his reversion in certain property by reason of the defendant's having cut down and carried away certain timber-trees. It is admitted that there is no injury to the reversion if the trees in question were the defendant's by virtue of a contract which he could enforce. The first question is, whether this contract was within the 4th section of the Statute of Frauds, and therefore ought to have

(1) 1 East, 192.

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been in writing; and the second is, whether, if it was not, there was sufficient evidence of an acceptance and receipt of a part of the goods under the 17th section. With respect to the first point, when the subject-matter of the contract is something affixed to land, the question is whether the contract is intended to be for the purchase of the thing affixed only, or of an interest in the land as well as the thing affixed. In the former case the contract is not within the 4th section. Certain tests have been judicially agreed on with regard to this question, many, if not all, of which are contained in the note to *Duppa* v. *Mayo*, in the last edition of Williams' Saunders, which has the authority of that profound lawyer, the late Sir E. V. Williams. That note gives certain tests as applicable to particular cases. Where the subject-matter of the contract is growing in the land at the time of the sale, then if by the contract the thing sold is to be delivered at once by the seller the case is not within the section. Another case is where, although the thing may have to remain in the ground some time, it is to be delivered by the seller finally, and the purchaser is to have nothing to do with it until it is severed, and that case also is not within the section. Then there comes the class of cases where the purchaser is to take the thing away himself. In such a case where the things are fructus industriales, then, although they are still to derive benefit from the land after the sale in order to become fit for delivery, nevertheless it is merely a sale of goods, and not within the section. If they are not fructus industriales, then the question seems to be whether it can be gathered from the contract that they are intended to remain in the land for the advantage of the purchaser, and are to derive benefit from so remaining; then part of the subject-matter of the contract is the interest in land, and the case is within the section. But if the thing, not being fructus industrialis, is to be delivered immediately, whether the seller is to deliver it or the buyer is to enter and take it himself, then the buyer is to derive no benefit from the land, and consequently the contract is not for an interest in the land, but relates solely to the thing sold itself. Here the trees were timber-trees, and the purchaser was to take them immediately; therefore, applying the test last mentioned, the contract was not within the 4th section.

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The second question therefore arises, viz. whether the contract, being a verbal one for goods above the value of 10*l.*, there was any evidence of an acceptance and actual receipt of the whole or part of them within the 17th section before the countermand of the sale by the letter of the 2nd of March. It seems to me that the effect of the leave reserved is, that if there was such evidence the plaintiff must fail. It was not denied in argument that there was an acceptance; the only question therefore is, whether there was evidence of a receipt. Though there was an acceptance, there was no actual carrying away of the things from the premises of the seller. The seller was not in actual possession of the land, but I think that makes no difference, and the case must be treated as if he were. The purchaser, by virtue of his licence to go on the land, with the acquiescence of the tenant, went on the land, and, while the verbal contract was still uncountermanded by the plaintiff, cut down six of the trees and made a sub-contract for the sale of the tops and stumps. If the sub-sale had stood alone, I should have doubted whether it would have been evidence of an actual receipt; but here he did something to the trees themselves. I should be inclined to say that where there is no actual removal of the things sold the question depends on this proposition, viz. that when there has been, during the existence of the verbal contract, for however short a time, an actual possession of the things sold, and something has been actually done to the things themselves by the buyer which could only properly be done by an absolute owner, there is evidence to go to a jury of an actual receipt of the things. This principle will, I think, be found to be the governing principle in all the decided cases. Thus, for instance, where goods were handed over the counter to the purchaser and marked by him; where casks, though not taken away, have had their spigots cut off by the purchaser, and in other similar cases there has been an actual possession by the buyer and something actually done to the goods themselves by him which could only properly be done by an absolute owner. Here, by cutting down the trees, the defendant actually did something to them which, apart from the sale over of the toppings, amounted in my opinion to an actual receipt of them. That being so, the words of the 17th section seem to me

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to have been satisfied. Consequently the plaintiff fails on both the questions raised, and the rule must be ~~discharged~~ absolute.

GROVE, J. I am of the same opinion. I have very little to add to the observations of my Lord and my Brother Brett. It seems to me that, in determining the question whether there was a contract for an interest in land, we must look to what the parties intended to contract for. In all the cases this has been made the test. In the case of *Smith* v. *Surman* (1) it was argued by Russell, Serjt., that "a sale of crops, or trees, or other matters existing in a growing state in the land may or may not be an interest in land according to the nature of the agreement between the parties and the rights which such an agreement may give;" and that view was adopted by the Court in giving judgment. Littledale, J., says: "The object of a party who sells timber is not to give the vendee any interest in his land, but to pass to him an interest in the trees when they become goods and chattels. His intention clearly was not to give the vendee any property in the trees until they were cut and ceased to be part of the freehold." Park, J., in his judgment, also applies substantially the same test, viz. that of intention. Here the trees were to be cut as soon as possible, but even assuming that they were not to be cut for a month, I think that the test would be whether the parties really looked to their deriving benefit from the land, or merely intended that the land should be in the nature of a warehouse for the trees during that period. Here the parties clearly never contemplated that the purchaser should have anything in the nature of an interest in the land; he was only to have so much timber, which happened to be affixed to the land at the time, but was to be removed as soon as possible, and was to derive no benefit from the soil. If the contract had been for the sale of a young plantation of some rapidly-growing timber, which was not to be cut down until it had become substantially changed and had derived benefit from the land, there might have been an interest in land, but this is not such a case. With regard to the second question, I agree with the observations made by the rest of the Court, except that I am not satisfied that it makes no difference that the land was

(1) 9 B. &. C. 561.

not in the possession of the plaintiff, but of his tenant. It seems to me that that makes the case stronger with regard to the question whether there was an actual receipt of the goods than it would have been if they had been left on land which was the property of the vendor.

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Rule ~~discharged~~. absolute

Solicitor for plaintiff: *Paley.*
Solicitors for defendant: *Stubbs, for Hirst & Capes.*

KINGCHURCH *v.* THE PEOPLE'S GARDEN COMPANY, LIMITED. *Nov.* 10.

Practice—Stay of Proceedings—Winding-up Petition—Judicature Act, 1873, *s.* 24, *subs.* 5.

A petition for an order to wind up a company having been preferred to the Chancery Division before the Master of the Rolls, an application was made to the Common Pleas Division to stay proceedings in an action of ejectment pending in that Division against the company:—

The Court refused the application, being of opinion that it might more conveniently be made to the Master of the Rolls.

THIS was an action of ejectment pending in the Common Pleas Division of the High Court of Justice.

A petition for a winding-up order against the defendants' company had been preferred in the Chancery Division to the Master of the Rolls, which had not yet come on for hearing.

Nov. 10. *H. Tindal Atkinson* moved for a stay of proceedings in the action, until after the winding-up proceedings had been disposed of, on behalf of the trustee of a bankrupt, to whom it was alleged that the defendants were largely indebted. [He cited the 5th subsection of the 24th section of the Judicature Act, 1873, and the 85th section of the Companies Act, 1862 (25 & 26 Vict. c. 89).]

LORD COLERIDGE, C.J. This is an application made under the 5th subsection of the 24th section of the Judicature Act, 1873, to stay proceedings in an action of ejectment pending in this Division of the High Court. The application is made by a party who is not a party to the action, on the ground that if the action proceeds

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the result will be to prejudice the equitable proceedings before the Master of the Rolls. It is admitted that before the Judicature Act the proper course in such a case would have been to apply to the Master of the Rolls to stay any proceedings which might interfere with his equitable jurisdiction by injunction. It is suggested that the Judicature Act has made an alteration in this respect, and has taken away from the Master of the Rolls the power of so interfering. This would seem to me a singular result, but nothing in the Act or the rules has been pointed out to us which has the effect contended for. It is very much more convenient that the Master of the Rolls should deal with this matter. I do not doubt that under the words of the 5th subsection we might exercise this jurisdiction, but every consideration derived from precedent and convenience is in favour of its being left to the Master of the Rolls, who has the whole matter before him.

GROVE, J. If this application had been one only relating to the action pending in this Division, I should have thought this Court ought to have entertained it; but the reason for this application is not anything occurring in the action itself, but something which has taken place in another Division of the High Court, viz. before the Master of the Rolls. We are now asked to interfere in the same way as the Master of the Rolls would have done under the Companies Act before the Judicature Act was passed. This is asking this Division to exercise a jurisdiction which they may have under the 5th subsection, but which, by practice and statute, has always previously been exercised by the Court having cognizance of the winding-up proceedings, which this Division has not. We are not asked to interfere in a matter chiefly or entirely before us, but to do what a Court, which is now a Division of the High Court, as we are, used always to do before the Judicature Act. There is nothing to confine such an application as this to the Division in which the action was begun, and in every respect it will be much more convenient that this application should be made to the Master of the Rolls, who, in the winding-up proceeding, can take cognizance of the whole matter.

ARCHIBALD, J. This is an application for a stay of proceedings in an action in aid of a proceeding for winding-up the defendants'

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company. I have no doubt that we have jurisdiction, but I also have no doubt that the Master of the Rolls still has power to make this order. Every consideration of convenience is in favour of the application being made to him. He has all the materials before him for judging of the propriety of the application, and on what terms (if any) it should be granted, which we have not; and, moreover, if we leave the matter to him, there will be no possibility of a schism between the two Divisions of the Court on the subject. In my opinion, therefore, the application should be made to the Master of the Rolls, and not to this Division.

Rule refused.

Solicitors for applicant: *Digby & Liddle.*

[IN THE COURT OF APPEAL.]

Nov. 23.

OGG AND ANOTHER *v.* SHUTER.

Sale of Goods—Passing of Property—Bill of Lading deliverable to Order of Vendor—Default of Purchaser—Jus disponendi.

Where an unpaid vendor shipping goods under a contract of sale takes a bill of lading making the goods deliverable to his order, and retains such bill of lading in his own or his agent's hands for his own protection, he does not reserve the vendor's lien only, in case of the purchaser's making default in payment of the price, but reserves a right of disposing of the goods so long at least as the purchaser continues in default.

APPEAL from the decision of the Court of Common Pleas, discharging a rule to enter a verdict for the defendant. (1)

The declaration was for conversion of 251 sacks of potatoes.

Pleas, not guilty, and that the goods were not the plaintiffs' as alleged. Issues thereon.

The facts were as follows. The plaintiffs had, in January, 1874, entered into a contract with Mons. Paresys Loutre, of Merville in France, for the purchase from him of potatoes. The contract was contained in several letters between the purchasers and the vendor. The terms ultimately agreed on were as follows, viz. for twenty tons of potatoes, at 84 fr. per 1000 kilogrammes, deliver-

(1) Law Rep. 10 C. P. 159.

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able in the course of the current month, free on board of a ship at Dunkirk, payment to be by cash against bill of lading signed by the captain. It was also stipulated that there should be a part payment of 30*l.* in earnest of the bargain. The plaintiffs paid 30*l.* in part payment, and the potatoes were shipped by the defendant's agent at Dunkirk under the contract on board the ship *Blonde* at Dunkirk for London, in sacks sent over for the purpose by the plaintiffs. The bill of lading taken by the defendant's agent made the goods deliverable to order.

The *Blonde* arrived in the Thames on the 26th of January, and the potatoes were unloaded at Cotton's Wharf on that or the next day. It was erroneously supposed by the plaintiffs, for some reason which did not very clearly appear, that the shipment was sixteen sacks short.

On the 27th of January the vendor's draft for the balance of the price was presented with the bill of lading annexed by the holders, Messrs. Devaux & Co., to whom it had been indorsed; but the plaintiffs declined to accept for the full amount, and requested the holders of the draft to keep it until the discharge of the vessel, to see what there was on board. This the holders declined to do. The plaintiffs on the same day wrote to the vendor stating that the shipment was short, and that they had consequently refused to accept the draft, and requesting him to write to his agent to present to them the invoice receipted and the bill of lading of what was on board, and promising, on this being done, to send a cheque for the balance of the purchase-money by return of post.

On the discharge of the ship the right quantity of potatoes proved to be on board. On the 27th of January, the draft was again presented by a notary with the bill of lading attached for payment, and payment was again refused by the plaintiffs, and the draft was then noted and returned to the holders. On the 30th of January the defendant, to whom the bill of lading and draft had then been respectively given and indorsed by the vendor's agent at Dunkirk, presented to the plaintiffs the said draft with the bill of lading indorsed by the defendant annexed thereto, and requested the plaintiffs to honour and pay the draft, which the plaintiffs, for the reasons aforesaid, declined to do.

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On the 30th of January the plaintiffs wrote to the defendant, giving him notice that the potatoes were their property, and that if he parted with them to anybody else he would be held responsible. On the 2nd of February the plaintiffs wrote to the vendor as follows: "Our Mr. Ogg having left London for Antwerp on Saturday last [30th of January], at that time we were not able to ascertain the correct quantity of potatoes shipped to us per steamer *Blonde*. We wish you to understand that we only want what is right, and we regret that we do not know each other better; and as we have been treated unfairly in business transactions of this nature before, we think it well to see quantity of goods before we pay on bill of lading, especially as the officials inform us of short shipment. Since Mr. Ogg's departure the potatoes have been discharged from vessel to wharf, and find on examination the goods are correct in quantity. I have telegraphed the particulars to Mr. Ogg in Antwerp, and on his return on Thursday he will then take delivery of the goods."

On the 2nd of February the defendant, in consequence of instructions received from the vendor's agent at Dunkirk, sold the goods.

At the trial before Keating, J., after the foregoing facts, and correspondence had been proved, the jury found that the goods were not of such a perishable nature as to render the sale of them necessary; and thereupon the learned judge directed the verdict to be entered for the plaintiffs, reserving leave to the defendant to move, the Court to draw inferences of fact. A rule nisi was obtained on the ground that neither the property nor right of possession had passed to the plaintiffs, and subsequently discharged.

Nov. 22. *Milward, Q.C.*, and *Willis*, for the defendant, contended that the property in the goods had not passed to the plaintiffs, and that even if it had, the vendor's lien still continued, and consequently trover would not lie.

Prentice, Q.C., and *Holl*, for the plaintiffs, contended that the property had passed, that the plaintiffs were not in default under the contract, and that, consequently, the sale of the goods was tortious, and determined the vendor's lien.

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The authorities cited were the same as in the Court below, and as follows :—*Halliday* v. *Holgate* (1); *Donald* v. *Suckling* (2); *Bloxam* v. *Saunders* (3); *Chinnery* v. *Viall* (4); *Bussey* v. *Barnett* (5); *Valpy* v. *Oakley* (6); *Simmons* v. *Swift* (7); *Dixon* v. *Yates*. (8)

Cur. adv. vult.

Nov. 23. The judgment of the Court (Lord Cairns, C.; Kelly, C.B.; Bramwell, B.; and Blackburn, J.) was delivered by

LORD CAIRNS, C. In this case it appears, from the judgments below, that the Court of Common Pleas drew the inference of fact that the plaintiffs were not in default in refusing to accept the draft for 34*l.* which was tendered to them for acceptance along with the bill of lading. We have been unable to reconcile this finding with the statements in the case, more particularly with the statement in paragraph 13 (9), which seems to us to shew that the plaintiffs were in default. Taking this fact, as we understand it, we think that the judgment in favour of the plaintiffs is erroneous, and should be reversed. The transactions in which merchants shipping goods on the orders of others protect themselves by taking a bill of lading, making the goods deliverable to the shipper's order, involve property of immense value, and we are unwilling to decide more than is required by the particular case. But we think this much is clear, that where the shipper takes and keeps in his own or his agent's hands a bill of lading in this form to protect himself, this is effectual so far as to preserve to him a hold over the goods until the bill of lading is handed over on the conditions being fulfilled, or at least until the consignee is ready and willing and offers to fulfil these conditions, and demands the bill of lading. And we think that such a hold retained under the bill of lading is not merely a right to retain possession till those conditions are fulfilled, but involves in it a power to dispose of the goods on the vendee's default, so long at least as the vendee con-

(1) Law Rep. 3 Ex. 299.
(2) Law Rep. 1 Q. B. 585.
(3) 4 B. & C. 941.
(4) 5 H. & N. 288; 29 L. J. (Ex.) 180.
(5) 9 M. & W. 312.
(6) 16 Q. B. 941; 20 L. J. (Q.B.) 380.
(7) 5 B. & C. 857.
(8) 5 B. & Ad. 313.
(9) The 13th paragraph related to the refusal to accept the draft on the 30th of January.

tinues in default. It is not necessary in this case to consider what would be the effect of an offer by the plaintiffs to accept the draft and pay the money before the sale, for no such offer in this case was ever made.

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Judgment reversed.

Solicitors for plaintiffs: *Dalton & Jesset.*
Solicitors for defendant: *Heather & Co.*

[IN THE COURT OF APPEAL.]

Nov. 27.

WHITAKER *v.* FORBES.

2 QBD 110

Rent Charge—Action of Debt for Arrears—Venue.

An action of debt having been brought for arrears of a rent-charge upon lands in Australia prior to the commencement of the Judicature Act:—

Held, affirming the decision of the Court below, that the venue in such action was local, and that it could not therefore be maintained in this country.

ERROR from the judgment of the Court of Common Pleas in favour of the defendant.

The pleadings are set out in the report of the case in the Court below. (1)

West, Q.C., and *Willis* argued for the plaintiff.

F. M. White and *A. P. Stone* for the defendant, were not called upon.

[The following authorities were cited:—*Pine* v. *Countess of Leicester* (2); *Mostyn* v. *Fabrigas* (3); *Doulson* v. *Matthews* (4); *Webb* v. *Jiggs* (5); *Burnett* v. *Lynch* (6); *Norris* v. *Chambres* (7); *Toller* v. *Carteret* (8); *Lord Ardglasse* v. *Muschamp* (9); *Paget* v. *Ede* (10); *Moule* v. *Garrett* (11); *Barker* v. *Damer* (12); *Skinner* v. *East India Co.* (13); *Kennedy* v. *E. of Cassilis.* (14)]

(1) Law Rep. 10 C. P. 583.
(2) Hob. 37.
(3) 1 Cowp. 161.
(4) 4 T. R. 503.
(5) 4 M. & S. 113.
(6) 5 B. & C. 589.
(7) 29 Beav. 246; 30 L. J. (Ch.) 285.
(8) 2 Vern. 494.
(9) 1 Vern. 75.
(10) Law Rep. 18 Eq. 118.
(11) Law Rep. 5 Ex. 132; 7 Ex. 101.
(12) Carth. 182.
(13) Cited, Cowp. at p. 167.
(14) 2 Swanst. 324.

7 Jur. N.S. 57.

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LORD CAIRNS, C. The recent legislation provides that for the future there shall be no distinction between local and personal actions as regards venue. It may be that hereafter such an action as this would be maintainable, but it is not necessary to express an opinion on the point. The question now is, whether, before the Judicature Act, an action such as this could be maintained. So far as appears on these pleadings it may be that both the parties are in this country, and have never been out of it, and it is not denied that the defendant entered into possession (which may have been through an agent) of the estate, and has received rents and profits from it more than sufficient to cover the amount of the rent-charge. Under these circumstances, if we had to consider the case apart from the authority of the decisions, it might be that we should be glad to hold, and should think it very reasonable, that the action was maintainable; but we must look to what the law of the matter is as settled by authority. There is clearly no liability here by way of contract. The defendant's liability arises, if at all, only by reason of his having taken possession of the land which is chargeable with the rent-charge. That liability, therefore, arises by reason of what is called privity of estate, i.e. in respect of the party's possession of the estate. Before real actions were abolished the only remedy during the continuance of a freehold rent-charge was by real action; but when the rent-charge had ceased to exist, debt lay for any arrears of it remaining unsatisfied. Such an action of debt was a local action to be tried by a jury of the county where the land was situate. The law in this respect is clearly laid down in the cases of *Pine* v. *Countess of Leicester* (1) and *Thursby* v. *Plant*. (2) Since the statute abolishing real actions, the Courts have held that an action of debt will lie for the arrears during the continuance of the rent-charge. The question is whether, with regard to such actions, the same law applies as was laid down in the cases I have referred to with regard to actions of debt after the determination of the rent-charge. I do not think we can depart from a rule of law which has been so long regarded as settled by the authorities to which I have referred and which has never since been departed from. It was suggested by Mr. Willis that, though that might be the law

(1) Hob. 37. (2) 1 Notes to Wms. Saund. 306–308.

with regard to cases where the land was situated in England, when the land was out of England the same rule would not apply, and the venue would cease to be local. I cannot find any ground for such a proposition either in principle or on authority. The principle of the decisions seems to be, that when the venue is local the case must be tried by a jury from the place where the venue is laid, and if no such jury can be summoned the principle would seem equally to shew that the case cannot be tried in England at all. Sitting in a court of error, I think we are bound by the authorities, although possibly it might be convenient that the action should lie under such circumstances as exist in the present case. The judgment of the Court below must be affirmed.

KELLY, C.B. The distinction between local and transitory actions has been recognised for centuries, and it has been clearly decided that such an action as this is local. I agree with the Lord Chancellor that it is to be regretted we have not the power to deal with this case in accordance with what would appear under the circumstances to be the justice and convenience of the matter; but we cannot assume to ourselves powers which we do not possess. We must act upon the law as laid down in a long and uniform series of decisions.

BRAMWELL, B. I am of the same opinion. I will add nothing, except to refer to the American case of *Livingstone* v. *Jefferson* (1), where the law on this subject seems to have been ably summarised by Marshall, C.J.

BLACKBURN, J. I am of the same opinion. I do not think this case raises any question as to jurisdiction, though in some respects it has been argued as if it did. The case turns on the technical distinction between local actions, where the trial must be local, and transitory actions, and the question is one of venue only. It seems to me that the decision of the Court below on this question was correct.

Judgment affirmed.

Solicitors for plaintiff: *Whitaker & Woolbert.*

Solicitor for defendant: *Donnithorne.*

(1) 1 Brock. Rep. 203.

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Dec. 11.

[IN THE COURT OF APPEAL.]

CORY AND OTHERS *v.* BRISTOW.

Poor Rate—Rateability of Moorings in the River Thames—Thames Conservancy Act, 1857, 20 & 21 *Vict. c. cxlvii. s.* 91.

The conservators of the river Thames, who are by statute owners of the river bed, gave permission, by resolution, to the plaintiffs to lay down certain moorings in the river bed, and place a derrick hulk at them, the work to be done to the satisfaction of the conservators and under the inspection of the harbour master, and to remain on certain conditions being agreed to and observed by the plaintiffs. These conditions provided that a certain rent should be paid for the moorings, and specified the purposes for, and the manner in which, the hulk was to be used, and that in all other respects it was to be worked to the satisfaction of the conservators, under the inspection of the harbour master; and the permission was expressed to be granted on the full understanding, on the part of the plaintiffs, that if at any time thereafter it should be found inexpedient to permit the moorings for the derrick hulk to remain in that or any other part of the river, the conservators would, under the powers vested in them by the 91st section of the Thames Conservancy Act, cause the same to be removed. That section provides that no mooring chains shall be put down in the river without the permission of the conservators, and that the conservators may at any time, by giving a week's notice in writing, require such mooring chains to be removed; and if not removed accordingly, may themselves remove them.

In pursuance of the permission so given, the plaintiffs procured moorings to be laid down, paying for the necessary labour and materials, and placed a derrick hulk at such moorings, which had continued there for some years, and was used by the plaintiffs for the purposes of unloading and re-loading coal in the course of their business as coal merchants. The moorings so laid down consisted of anchors and stones, which were laid down in deep holes, dug in the bed of the river, and covered in with large quantities of ballast. The moorings so formed were of a permanent character, and it would have been impossible for the derrick using them to weigh them in the ordinary way in which ships weigh anchor:—

Held, reversing the decision of the Court below, that the plaintiffs were the occupiers of the moorings, and were liable to be rated in respect of such occupation.

Affirmed 2 App. Cas. 262 H.L.

ERROR, from the judgment of the Court of Common Pleas upon a special case in favour of the plaintiffs.

The facts are set out in the report of the case in the Court below. (1)

Barrow, for the defendant.

Patchett, for the plaintiffs.

(1) Law Rep. 10 C. P. 504.

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The arguments were substantially the same as those in the Court below, and the following cases were cited:—*Rex* v. *Bath* (1); *Rex* v. *Brighton Gas Co.* (2); *Electric Telegraph Co.* v. *Salford* (3); *Watkins* v. *Overseers of Milton-next-Gravesend* (4); *Pimlico Tramways Co.* v. *Greenwich Union* (5); *Dyson* v. *Collick* (6); *London and North Western Ry. Co.* v. *Buckmaster* (7); *Allan* v. *Overseers of Liverpool* (8); *Reg.* v. *Morrison* (9); *Cory* v. *Overseers of Greenwich.* (10)

JAMES, L.J. I cannot agree in the conclusion at which the Court of Common Pleas have arrived. There is no dispute as to the general principle of law, viz. that where any part of the soil is permanently occupied by anybody for profitable purposes, as, for instance, where it is occupied by a company by means of its water or gas pipes or telegraph posts, then the person so occupying is rateable in respect of such occupation; but when a person has a mere right to use the land in the nature of an easement, which does not amount to occupation, and the occupation remains in somebody else, as for example, in the case of a lodger where the occupation remains in the lodging-house keeper, then such person is not liable to be rated. The rateable quality of the portion of land so used is not gone, but it is rateable in the hands of the person who is the occupier. The question, then, in the present case, is really one of fact rather than of law, viz. what is the nature of the right given to the plaintiffs by the resolution of the conservators? Under the Thames Conservancy Acts the conservators have vested in them the bed and soil of the river with considerable powers, partly for the purpose of raising a fund for the maintenance and improvement of the navigation and partly for the benefit of the Crown. They have power to prevent anything that would be a nuisance and generally to preserve the navigation of the river. In their capacity of owners of the soil by virtue of the statute, they have power to grant a variety of rights so far

(1) 14 East. 609.
(2) 5 B. & C. 466.
(3) 11 Exch. 181; 24 L. J. (M.C.) 146.
(4) Law Rep. 3 Q. B. 350.
(5) Law Rep. 9 Q. B. 9.
(6) 5 B. & Ald. 600.
(7) Law Rep. 10 Q. B. 70.
(8) Law Rep. 9 Q. B. 180.
(9) 1 E. & B. 150; 22 L. J. (M.C.) 14.
(10) Law Rep. 7 C. P. 499.

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as it may be done with due regard to the interests of the navigation, as, for instance, the right to make wharves and piers, and to allow moorings to be laid down. In this case they have granted to the plaintiffs the right of affixing mooring chains, and this has been done by means of a very substantial erection of a permanent character. Great holes have been dug in the soil of the bed of the river, and great stones put down, chains being passed through the stones, and seventy tons of ballast put over the stones in each hole. Such an erection is as much a permanent erection for the present purpose as a house would be. The right to make this erection having been given by the conservators to the plaintiffs, the plaintiffs got the work done at their own expense and with their own materials. It seems to me that a grant of a right to any one to erect and maintain a permanent structure affixed to the land, such as a wall or other building, or such as the structure now in question, for his own exclusive use and benefit,—call it a licence or whatever name you will,—is primâ facie a grant of a right to have a permanent possession of the piece of land on which such structure is erected. The case is similar to that of the telegraph posts which was cited. But then it is said that we are to put a different construction on the right here granted, because the conservators have a right to remove this structure. But it seems to me that the nature of this right of removal really strengthens the conclusion we have come to. The plaintiffs are to be allowed to have possession of this structure without interference from the conservators, unless in the exercise of their functions they come to the conclusion that it is inexpedient for the public interest to permit it to remain and give a week's notice to remove it. Till then the plaintiffs are to have the full jus possessionis even as against the conservators themselves. And if the conservators interfered with it, it appears to me that the plaintiffs would have an action of trespass against them. It seems to me that under the circumstances the plaintiffs were the occupiers, and were rateable in respect of such occupation, and therefore that the decision of the Court below should be reversed.

MELLISH, L.J. I am of the same opinion. The first question is whether this mooring apparatus became part of the realty. If

so, it is clear that it would be the subject of rating. An ordinary anchor cast out of a ship would not, merely because it was fixed in the soil, become a part of the realty. That was the principle, as it appears to me, upon which the former case between these parties was decided. It was there considered that the mooring stone could not be taken to be in the nature of a permanent structure, but was only put down temporarily to keep the vessel in its place, and could be pulled up at any time like an ordinary anchor. Here, having regard to the description of the mooring stone, and the manner in which it was fixed, I cannot avoid coming to the conclusion that it had become a part of the realty. It is also quite plain that there was a profitable occupation, because a large sum of money was paid for the right to have these moorings. The only remaining question, therefore, is whether the conservators or the plaintiffs are in the occupation of these moorings. Now it seems to me that the Court of Common Pleas have not sufficiently taken into consideration the fact that these mooring stones all along belonged to the plaintiffs. There is a great distinction in that respect between this case and cases such as those in which the question arose, as between a person who had had granted to him some right of user of the land and the grantor who had reserved some right over it to himself, which of the two was the occupier for rating purposes; as, for instance, the cases where the question was whether a party was in the position of a lodger merely, the landlord remaining the occupier, or in that of a tenant. Very nice distinctions have arisen in such cases, but there both parties have more or less a co-property in the house, or other real property in question. It is necessary in such a case to consider what degree of right each party may have. But here the conservators did not obtain any property in the mooring stones, anchors, or chains, and it was never intended that they should be applied in any way for the benefit of the conservators. I do not see how the present case can be distinguished from the cases in which water-pipes, gaspipes, and telegraph posts have been held rateable. These cases seem to me to shew that where a person in possession of land allows another to make on such land an erection which becomes part of the realty, and to use such erection for his own exclusive purposes, and the landowner is to have no benefit from

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or interest in such erection, there is an occupation by the person making such erection in respect of which he is rateable. For these reasons, I think the judgment should be reversed.

BAGGALLAY, J.A. I am of the same opinion. There is no question as to the legal principle upon which questions of this kind depend. The principle, as I gather it from a long series of decisions, is that the foundation of rateability is the exclusive occupation of the rateable subject. All that we have to do, therefore, is to ascertain whether the plaintiffs had the exclusive occupation of the rateable subject. I do not think it necessary to go through the facts, but I agree that the result of them is that the exclusive occupation of the moorings was in the plaintiffs. The case of the telegraph posts seems to be the most nearly in point as an authority. As a court of appeal we might reconsider the decision in that case, but it appears to me that it only follows a long series of cases all pointing in the same direction.

BLACKBURN, J. I am of the same opinion. It is only on one point that I differ from the Court of Common Pleas. All the judges below agreed that the manner in which these moorings were laid down was such as to render them rateable in the hands of the occupiers, whoever they might be. But they thought that the plaintiffs were not the occupiers of them. In that respect I differ from them. I will not discuss the cases in which such distinctions as that between use of a house by a person as a lodger and occupation by a tenant have been discussed with regard to rating questions. The principles which govern such cases have been explained as well as I could explain them now in two cases. One was *Smith* v. *St. Michael, Cambridge* (1), a case in which it appeared to Hill, J., and myself, after consideration, that notwithstanding various strong technical expressions pointing in the direction of a demise, we must look to the real facts, and finding that the landlord was to retain possession of the premises by his servants for certain purposes, such as cleaning, we thought that he must be taken to be the occupier for the purpose of rateability, and the occupation of the commissioners of inland

(1) 3 E. & E. 383.

revenue, to whom he had granted the use of the rooms, was merely in the nature of that of a lodger. The other case is *Roads* v. *Overseers of Trumpington* (1), which was just the converse case, for there, though no technical words such as "rent," or "demise," were used, we thought that, looking to the whole of the agreement, there was in fact a right of exclusive possession given to the appellant, and so, that he was properly rated. It is on the application of the principles laid down in those cases to the present that I differ from the Court of Common Pleas, rather than on any question of principle. Lord Coleridge, C.J., seems to have thought that the conservators could not have intended to part with the exclusive possession of any part of the bed of the river, chiefly on the ground that it would have been contrary to the provisions of their Acts to have done so, and he quotes the terms of the 91st section of 20 & 21 Vict. c. cxlvii. in proof of this; and Brett, J., also seems to have thought that a duty was imposed on the conservators not to part, for however short a time, with the absolute power and control over any part of the bed of the river. If I could see that that was so, I should have agreed that though the conservators might have used words pointing in the direction of a grant of the exclusive occupation, they must have meant only to give a right in the nature of an easement, retaining the occupation in themselves. I cannot however find any provision in the Act such as the Court of Common Pleas seems to have supposed it to contain. The terms of the resolution seem to me to give the plaintiffs a right to have these moorings subject to the right of the conservators to remove them at any time on giving the week's notice required by the 91st section. Until such notice was given the conservators were bound by the bargain they had made, and I cannot doubt if they had removed the moorings without giving notice they would have laid themselves open to an action of trespass. So far from the Acts prohibiting the conservators from parting with the possession of any part of the bed of the river, I find an express provision enabling them to allow moorings to be laid down and their control over the part of the river bed, where such moorings might be, to be suspended until a week's notice to remove them has

(1) Law Rep. 6 Q. B. 56.

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expired. Under these circumstances I can come to no other conclusion than that, until such notice had been given, the plaintiffs became, by virtue of their agreement with the conservators and what was done under it, the exclusive occupiers of these moorings. That the occupation was a profitable one is clear from the facts of the case, and consequently the plaintiffs became rateable in respect of it.

Judgment reversed.

Solicitor for plaintiffs: *M. Shephard.*
Solicitor for defendant: *W. Bristow.*

Nov. 24.

SMITH *v.* CHEESE AND ANOTHER.

Bill of Sale—Attesting Witness, Description of—"Gentleman."

The attesting witness to a bill of sale was described in the affidavit required by 17 & 18 Vict. c. 36 as "gentleman." He had been a proctor's managing clerk, but had ceased to be so for six years. Since that time he had lived on an allowance from his mother, and had, on a few occasions, collected debts and written letters for other persons, and had drawn four bills of sale, but he had no regular occupation:—

Held, that the description "gentleman" was sufficient.

INTERPLEADER issue between the plaintiff as claimant of certain goods under a bill of sale and the defendants as execution creditors.

The case was tried before Brett, J., at the sittings in Hilary Term, in Middlesex, 1875, when the facts, so far as material to the question now raised, were as follows:—The attesting witness to the bill of sale, in the affidavit of such witness required by 17 & 18 Vict. c. 36, was described as a "gentleman." It appeared in evidence that he had been managing clerk to a proctor six years before the execution of the bill of sale. Since that time he had, on a few occasions, collected debts and been paid his expenses, and written letters for other persons; and it appeared that on four occasions he had drawn bills of sale, but he had had no regular occupation, and had subsisted on an allowance from his mother.

It was objected on behalf of the defendants that the description of the attesting witness was insufficient under the Bills of Sale Act, 17 & 18 Vict. c. 36.

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The verdict was entered for the plaintiff, leave being reserved to the defendants to move to enter a verdict for themselves, on the ground that the attesting witness's description was inaccurate, insufficient, or wrong.

A rule nisi had been obtained accordingly, against which

Gaskell and *Scott* shewed cause. They contended that the description was sufficient. They cited *Sutton* v. *Bath* (1); *Beales* v. *Tennant* (2); *Tuton* v. *Sanoner* (3); *Morewood* v. *South Yorkshire and River Dun Co.* (4); *Brodrick* v. *Scale.* (5)

G. Browne supported the rule. He contended that the term "gentleman," as applied to the attesting witness, was misleading; and that he ought to have been described either as "of no occupation," or as "drawer of bills of sale," or "debt collector," or otherwise in reference to the matters with which he had been occasionally occupied. He cited *Allen* v. *Thomson* (6); *Larchin* v. *North Western Deposit Bank* (7); *Tronsdale* v. *Sheppard.* (8)

GROVE, J. I think this rule should be discharged. I am not disposed to extend the use of the term "gentleman," which is a vague one, and gives no information; but I cannot suggest, nor has Mr. Browne been able to suggest, any better description of the attesting witness in this case. It has been suggested that he should have been described as of no occupation, but that would not assist any person in identifying him any more than the term "gentleman." Originally, the term "gentleman" signified a man of gentle blood, but the use of the term has become changed, and it is often applied to denote persons of all ranks, from the upper down to the very lowest verge of the middle class. The term might, no doubt, be so inapplicable as to mislead, but I cannot say that this was so here.

The Act requires a statement of the residence and occupation. The person in question could not be described as a proctor's clerk,

(1) 3 H. & N. 382; 27 L. J. (Ex.) 388.
(2) 29 L. J. (Q.B.) 188. 6 Jur. N.S. 628
(3) 3 H. & N. 280; 27 L. J. (Ex.) 293. 4 Jur. N.S. 365.
(4) 3 H. & N. 798; 28 L. J. (Ex.) 114.
(5) Law Rep. 6 C. P. 98.
(6) 1 H. & N. 15; 25 L. J. (Ex.) 249. 2 Jur. N.S. 451.
(7) Law Rep. 8 Ex. 86.
(8) 14 Ir. C. L. Rep. 370.

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because he had ceased to be one. He had no definite occupation; he had drawn bills of sales, written letters, and collected debts, but only on rare occasions. He was living on an allowance from his mother, and ready to do any job to eke it out. I do not see how any other description than "gentleman" would have assisted more to identify him. To have described him with reference to any of the things he had occasionally done might have been misleading, for such description would have pointed to a permanent occupation. The case of *Sutton* v. *Bath* (1) is a strong authority in favour of our present decision. It was there held that the term "gentleman" was a sufficient description, the party having no regular occupation. It was also held that it lies on the party impugning the bill of sale to shew that the description was insufficient. It seems to me that the defendants have not in this case shewn that the witness had any occupation, a reference to which would have conveyed more information than the term "gentleman." The case of *Morewood* v. *South Yorkshire and River Dun Co.* (2) seems to be also an authority in favour of the view we take.

ARCHIBALD, J. I am of the same opinion. The object of the statute was to secure the identification of the attesting witness. Two things are for this purpose to be specified, his residence and occupation. There is no provision that he is to state whether or not he has an occupation. One of Mr. Browne's contentions would exclude any person who had no occupation from being an attesting witness. But all that the Act means is, that if he has an occupation he must state it; it does not mean that if he has none he must say so expressly. The description of the occupation must, no doubt, not be such as to mislead; so in *Larchin* v. *North Western Deposit Bank* (3) the description of a person who was a clerk in the accountants' department of the North Western Railway as "accountant," was held to be misleading, because anyone reading that description would think that a person of some position in business as a principal, and not a mere clerk or subordinate was intended. Here the evidence was that the party had, in years

(1) 3 H. & N. 382; 27 L. J. (Ex.) 388.

(2) 3 H. & N. 798; 28 L. J. (Ex.) 114.

(3) Law Rep. 8 Ex. 80.

before, been a proctor's clerk, but had ceased to be so; that he had on four occasions in his life drawn bills of sale, and did occasionally collect debts, but there was nothing that could fairly be treated as an occupation, the description of which would assist in identifying him. Mr. Browne could not suggest any description that would be more satisfactory than that of "gentleman." I should say that he could not properly be described as a "drawer of bills of sale." Such a description would be an entire novelty, and would not be true. All the cases seem to proceed on the same principle, viz. that if a person has no occupation, it is sufficient to give his name and residence, and the addition of "gentleman," if that description is not so grossly inapplicable in common parlance as to be misleading, will do no harm.

LINDLEY, J. I am of the same opinion. For the purposes of this Act there are two classes of cases, one where there is an occupation, the other where there is none. If the party has an occupation, it must be correctly described; if he has none, it does not follow that the description of "gentleman" is proper, but if such an addition is in common parlance not so far inapplicable to the rank of society in which he moves as to mislead, the bill of sale will not be avoided if it be employed.

Rule discharged.

Solicitor for plaintiff: *W. H. Brown.*

Solicitors for defendants: *Merediths, Roberts, & Mills.*

MASON *v.* WOOD.

Nov. 3.

Bills of Sale Act, 17 & 18 *Vict. c.* 36, *s.* 1—*Proof of due filing of the Bill of Sale and Affidavit.*

Upon the trial of an interpleader issue, the plaintiff, in order to prove the due filing of a bill of sale in compliance with 17 & 18 Vict. c. 36, s. 1, produced the bill of sale itself and the following certificate stamped with the seal of the Court of Queen's Bench,—"*Johnson* and *Mason*. A document purporting to be a copy bill of sale, and dated the 8th day of April, 1875, indorsed with the above names, was registered at the judgment office of the Court of Queen's Bench on the 15th day of April, 1875:"—

Held, no evidence that an affidavit satisfying all the requirements of the statute had been filed with the bill of sale.

UPON the trial of an interpleader issue before the Salford Hundred Court, under 31 & 32 Vict. c. cxxx. s. 39, the claim of

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the plaintiff was founded on a bill of sale dated the 8th of April, 1875, whereby the household goods and effects of Mary Johnson were conveyed to him in consideration of a debt of 40*l.*, subject to redemption.

The only evidence offered to prove the bill of sale was the production of the bill of sale itself, and the following certificate bearing the seal of the Queen's Bench judgment office:—

"*Johnson* and *Mason*.

"A document purporting to be a copy bill of sale, and dated the 8th day of April, 1875, indorsed with the above names, was registered at the judgment office of the Court of Queen's Bench on the 15th day of April, 1875."

It was objected for the defendant that, in order to satisfy the terms of the Bills of Sale Act, 17 & 18 Vict. c. 36, s. 1, the plaintiff must shew that the affidavit required by that section was filed with the bill of sale.

For the plaintiff it was contended that the certificate was at all events primâ facie evidence that all things had been done to make the bill of sale a valid instrument.

The judge, however, ruled that it was incumbent on the plaintiff to shew that the affidavit required by the statute to be filed with the bill of sale had been duly filed; and, in the absence of such proof, he directed a verdict for the defendant.

Nov. 2. *Glyn* moved for a new trial, on the ground of misdirection. The learned judge was wrong in holding that it was necessary to prove affirmatively that the affidavit, required by the Bills of Sale Act, 17 & 18 Vict. c. 36, s. 1, to be filed with the bill of sale, had been actually filed. The certificate under the seal of the Court of Queen's Bench was at all events primâ facie evidence that everything had been rightly done. "The statute," says Williams, J., in *Grindell* v. *Brendon* (1), "requires the affidavit to be filed at the same time with the bill of sale: the clerk has no authority to receive the one without the other. That which certifies the time of the receipt of the one, therefore, certifies the receipt of the other at the same time." The same sort of point arose, under the Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, in

(1) 6 C. B. (N.S.) 698, 703; 28 L. J. (C.P.) 333.

Waddington v. *Roberts*. (1) There, a memorandum written on the face of a composition deed (according to s. 196 of that Act), stating the day and the hour of the day on which the deed was brought to the office of the chief registrar for registration, and that it was duly registered pursuant to the provisions of the Act, was held to be primâ facie evidence that an affidavit pursuant to clause 5 of s. 192, was delivered to the chief registrar, together with the deed, without proof of the truth of the affidavit. Blackburn, J., there said (2): "A creditor who desires to impeach the deed may prove that the affidavit contained false statements; but primâ facie the contents of an affidavit must be taken to be true, because the person making it is obliged to pledge his oath to its truth, and consequently is liable to punishment if he swears falsely; and the legal inference is that he has been accurate in what he has sworn."

[GROVE, J. The certificate in that case was that the document was *duly* registered.]

In the absence of evidence to the contrary, the Court will assume that the officer did his duty. In *Gugen* v. *Sampson* (3), where a similar objection to this was taken, Channell, B., said: "I do not think that such an objection as this should prevail upon the trial of an interpleader issue directed by the judge under the statute (4) to inform the conscience of the Court upon the particular fact sent down for trial. Any legal objection of this kind ought, I think, to be made before the judge at chambers when the issue is discussed; for, if the objections were found tenable, it would be idle to direct the issue, and thus put the parties to the delay and expense of a useless trial. I am of opinion, however, that the objection is not tenable. The certificate of registration is primâ facie evidence of a due registration within the statute, that is, of a registration *with a proper affidavit*."

Cur. adv. vult.

Nov. 3. LORD COLERIDGE, C.J. This was an application to set aside a verdict entered for the defendant, or for a new trial, upon the ground that evidence was rejected which ought to have

(1) Law Rep. 3 Q. B. 579.
(2) Law Rep. 3 Q. B. at p. 584.
(3) 4 F. & F. 974, 976.
(4) 1 & 2 Wm. 4, c. 58.

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been received to prove the due filing of a bill of sale, under the circumstances I am about to mention. If that evidence was receivable, the verdict ought to have been for the plaintiff. Now, the evidence offered to prove the filing of the bill of sale in compliance with the statute 17 & 18 Vict. c. 36, was, the bill of sale itself, with the following certificate stamped with the seal of the Court of Queen's Bench:—"*Johnson* and *Mason*. A document purporting to be a copy bill of sale, and dated the 8th day of April, 1875, indorsed with the above names, was registered at the judgment office of the Court of Queen's Bench on the 15th day of April, 1875." The objection to which the learned judge yielded was, that, this being a bill of sale under the statute, there should have been brought before the Court the affidavit which by s. 1 is required to be filed at the same time with the bill of sale, and that, in the absence of such evidence, the production of the bill of sale itself was no evidence that an affidavit complying with the requirements of the Act was filed at the same time. Now, the words of the Act are clear and unambiguous: "Every bill of sale, &c., or a true copy thereof, and of every attestation of the execution thereof, shall, together with an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same, and of every attesting witness to such bill of sale, be filed, &c., in the Court of Queen's Bench, within twenty-one days after the making or giving of such bill of sale; otherwise such bill of sale shall be null and void to all intents and purposes whatsoever." The question before us is, whether the production of a certificate which does state that a copy of the bill of sale was registered at the proper office was evidence that with such copy was filed the affidavit which by the Act the maker of the bill of sale is bound to file at the same time. I am of opinion that the mere production of the certificate above referred to is no evidence of that fact: and, unless an affidavit is filed with the bill of sale, containing all the particulars described and set forth in s. 1, the bill of sale is void. Nothing is more familiar in all the Courts than objections to the sufficiency of these affidavits. Any objection properly taken to the affidavit is an answer to the bill of sale itself. That being so, the bill of sale and the affidavit cannot be treated as

separate things. The Act says that both shall be filed, and filed together. It does not say that the officer shall refuse to file the one without the other, if at his own peril the maker of the bill of sale chooses to file the bill of sale without any affidavit, or with a defective affidavit. That this certificate therefore was no evidence that the requirements of the Act had been duly complied with, is obvious. We have been pressed with some authorities, and particularly with a recent case of *Waddington* v. *Roberts* (1), in the Court of Queen's Bench, where that Court is reported to have decided, upon s. 196 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), that a memorandum written on the face of a composition deed under s. 192, stating the day and the hour of the day on which the deed was brought to the office of the chief registrar for registration, and that it was *duly registered* pursuant to the provisions of the Act, is primâ facie evidence that an affidavit pursuant to clause 5 of s. 192 was delivered to the chief registrar together with the deed; and that it is unnecessary to prove the truth of the affidavit. That case is clearly no authority in favour of the admissibility of the certificate now in question. The memorandum there stated that which this certificate does not state, viz. that the document was "duly registered." It is altogether silent as to the affidavit. It does not even say that the bill of sale was filed in accordance with the provisions of the Bills of Sale Act. I may observe that, if Mr. Glyn's suggestion be acceded to, it will afford a very easy way of getting rid of objections to the affidavit. Upon the words of the Act, therefore, and distinguishing this from the case relied on, I am of opinion that there should be no rule.

BRETT, J. I am of the same opinion.

GROVE, J. I am of the same opinion. The judgment of Blackburn, J., in *Waddington* v. *Roberts* (1) rather shews the necessity of exercising caution in examining these certificates; because, after saying,—"The deed could not be lawfully registered unless accompanied by an affidavit: then, is the memorandum on the deed primâ facie evidence that an affidavit in compliance with the

(1) Law Rep. 3 Q. B. 579.

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enactment had been delivered to the registrar? I think it is, because it is to be presumed, until the contrary be shewn, that a public officer, acting in the execution of a public trust, would do his duty, and therefore that the registrar would not have registered the deed unless it was accompanied by the necessary affidavit;" and, after commenting upon *Grindell* v. *Brendon* (1), he goes on to say,—"Then, it is argued that the defendant was bound to prove, not only that the affidavit was delivered to the registrar, but also that it was true. That is not necessary. A creditor who desires to impeach the deed may prove that the affidavit contained false statements; but, primâ facie, the contents of an affidavit must be taken to be true, because the person making it is obliged to pledge his oath to its truth, and consequently is liable to punishment if he swears falsely, and the legal inference is that he has been accurate in what he has sworn." I think it is too clear to need further comment, that the requirements of the statute must, in order to prevent fraud, be strictly complied with.

Rule refused.

Solicitors for plaintiff: *Chester & Urquhart.*

Nov. 20.

EX PARTE ALCOCK.

Attorney—Attachment for Non-delivery of Bill—Waiver of personal Service of Rule—Practice.

A rule for an attachment against a solicitor for non-delivery of a bill of costs pursuant to a judge's order stood in the peremptory paper for the 9th of November; but owing to pressure of business the rule could not be argued on that day, and by consent of counsel on both sides it was adjourned to a future day. The counsel for the solicitor not appearing at the adjourned day, the Court made the rule absolute without an affidavit of personal service,—holding, upon the authority of *Cartwright* v. *Blackworth* (1 Dowl. 489), that the appearance of counsel and his consenting to the rule being enlarged was a waiver of personal service.

THIS was a rule calling upon a solicitor to shew cause why an attachment should not be issued against him for not delivering a bill of costs pursuant to a judge's order. After several enlargements in consequence of inability to serve the solicitor personally,

(1) 6 C. B. (N.S.) 698; 28 L. J. (Q.B.) 333.

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the rule stood in the peremptory paper for the seventh day of the present sitting; but, in consequence of there being a long list of reserved motions for new trials, it could not be heard on that day. The solicitor, however, had instructed counsel to appear to shew cause, between whom and the counsel for the applicant it was arranged that the argument should stand over for a future day.

Nov. 20. *Holmes Poulter* moved to make the rule absolute, no one appearing for the solicitor. The appearance of the solicitor by counsel on the 9th instant to shew cause against the rule, and his agreeing to adjourn it to a more convenient day, amounted to a waiver of personal service of the rule. In *Cartwright* v. *Blackworth* (1), it was held that, if a party against whom a rule is granted obtains its enlargement, he cannot afterwards object that the rule was not personally served.

[GROVE, J. There are two cases referred to in a note to that case, which rather look the other way; viz. *Wood* v. *Critchfield* (2) and *Clothier* v. *Ess.* (3)]

In the first of those cases, counsel appeared to object to the service of an imperfect copy of the rule; and in the other the objection was to the title of the affidavit upon which the rule was moved; in neither case could the objection be taken without appearing. So, in *Biddulph* v. *Gray* (4), upon a motion under 48 Geo. 3, c. 123, s. 1, to discharge out of custody a debtor who had remained in execution for twelve successive calendar months for a debt not exceeding 20*l.*, the application was opposed in the first instance on the ground that the notice required by Reg. Gen. 2 Wm. 4, r. 90 had not been served on the plaintiff. The service was on a servant to the landlord of the house in which the plaintiff lodged. It was contended that the insufficiency of the service was waived by appearing to take the objection; but Coleridge, J., said: "I do not think that his appearing here amounts to a waiver. He comes here to take the objection that he has not been duly served. The fact of his taking the objection shews that he does not intend to waive it. If his appearance here amounted to a waiver, then, in all cases, no matter how faulty soever the

(1) 1 Dowl. 489.
(2) 1 Dowl. 587; 1 C. & M. 72.
(3) 2 Dowl. 731.
(4) 5 Dowl. 406.

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service might be, the objection could never be taken." Here, the party does not appear to object that there has been no service of the rule. If he had intended to avail himself of that, he should have abstained from appearing. He did appear by counsel for the purpose of shewing cause against the rule on the day appointed for the argument, and consented to an adjournment. It is clearly too late now for him to take the objection.

GROVE, J. There seems to me to be no distinction between *Cartwright* v. *Blackworth* (1) and this case. There, there was an enlargement of the rule: here, there was a postponement after counsel had been instructed to oppose the rule, and with his consent. I must confess I can see no substantial distinction between the two cases. Upon the authority, therefore, of that case, I think this rule should be made absolute.

ARCHIBALD, J., concurred.

Rule absolute.

Solicitors for plaintiff: *Hancock, Sharpe, & Hales.*

Nov. 3.

SHARROCK *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

County Court—Rule calling upon the Judge, under 19 & 20 *Vict. c.* 108, *s.* 43, *to settle and sign a Case—Discretion of Court—Appeal under* 38 & 39 *Vict. c.* 77, *Order LVIII, rule* 10.

1 QBD. 256
1 Ex D. 407

The granting or refusing a rule calling upon a judge of a county court to settle and sign a case on appeal, under 19 & 20 Vict. c. 108, s. 43, is discretionary; and the Court is justified in refusing a rule where it plainly appears that no question of law can arise thereon.

The decision of the Court refusing such a rule upheld by the High Court of Appeal, on a motion under the Judicature Act, 1875 (38 & 39 Vict. c. 77), Order LVIII, rule 10.

THE plaintiff sued out a plaint in the county court of Carlisle, in which he claimed against the defendants 50*l.* for "damage sustained by the plaintiff by reason of injuries caused to a mare, the property of the plaintiff, through the negligence of the defendants, their agents, servants, or workmen; the said mare being at

(1) 1 Dowl. 489.

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the time of receiving the said injuries lawfully on the premises of the company, and by and with their consent and invitation."

The facts which appeared at the trial in the county court on the 22nd of June, 1875, were as follows:—The plaintiff sent a cart with the mare in question to the Southwaite station on the defendants' line, to take hay from one of their trucks. When the carter arrived at the station yard, he found it very crowded, and was told that his hay was at a siding to which he was directed. He accordingly went to the siding, which was not a usual unloading place, and, whilst proceeding there the mare, meeting with some obstruction, was frightened, and fell down an embankment which was unfenced, and received injury.

The judge gave judgment for the plaintiff, "on the ground that the defendants were bound to provide a safe and proper place for people to unload their goods," and on the further ground that "the siding in question was unfenced and unprotected, the place being rendered more dangerous by reason of some telegraph posts, on which the mare slipped, lying on the embankment."

The defendants' attorney asked the judge to find as a fact whether or not the mare was frightened by a passing train; but this he refused to do.

On the 5th of July, 1875, the defendants' attorney gave the plaintiff, and also to the registrar of the court, the following notice:—

"In the county court of Cumberland, holden at Carlisle.

"We, the above-named defendants, being dissatisfied with the determination of the Court in point of law on the trial of this cause, on, &c., do hereby give you, the above-named plaintiff, and also the registrar of the court, notice that it is our intention to appeal from the judgment then given for the plaintiff, to Her Majesty's Court of Common Pleas at Westminster, according to the statute in such case made and provided; and that the following (amongst others) are the grounds on which we the said company appeal, that is to say,—

"1. That there was no evidence of negligence or default of duty on the part of the defendant company conducing to the accident by which the plaintiff's mare was injured:

"2. That, in point of law, upon the facts proved, the plaintiff

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was wholly responsible for the accident and consequent injury to his said mare:

"3. That the plaintiff's negligence and want of proper care and precaution contributed to the happening of the said accident, and that therefore he was not entitled to recover:

"4. That, on the whole case, and upon the facts generally, the judgment and determination of the learned judge was wrong in point of law."

The judge having refused to settle and sign a case presented to him on the part of the defendants, upon an affidavit disclosing the above facts,

H. Sutton moved for a rule calling upon the judge of the Cumberland county court, and also upon the plaintiff, to shew cause why the former should not settle and sign a case on appeal. The application was founded upon s. 43 of 19 & 20 Vict. c. 108, which enacts that "no writ of mandamus shall henceforth issue to a judge or an officer of the county court for refusing to do any act relating to the duties of his office; but any party requiring such act to be done may apply to any superior Court, or a judge thereof, upon an affidavit of the facts, for a rule or summons calling upon such judge or officer of a county court, and also the party to be affected by such act, to shew cause why such act should not be done; and if after the service of such rule or summons good cause shall not be shewn, the superior Court, or judge thereof, may by rule or order direct the act to be done, and the judge or officer of the county court, upon being served with such rule or order shall obey the same on pain of attachment: and in any event the superior Court or a judge thereof may make such order with respect to costs as to such Court or judge shall seem fit." The defendants are under ss. 14, 15 of 13 & 14 Vict. c. 61 (1) entitled

(1) Sect. 14 enacts that, "if either party in any cause of the amount to which jurisdiction is given to the county courts by this Act shall be dissatisfied with the determination or direction of the said Court in point of law, or upon the admission or rejection of any evidence, such party may appeal from the same to any of the superior Courts of common law at Westminster [see 15 & 16 Vict. c. 54, s. 2], provided that such party shall, within ten days after such determination or direction, give notice of such appeal to the other party or his attorney, and also give security, to be approved by the clerk of

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to appeal; and the Court ought, under s. 43 of 19 & 20 Vict. c. 108,—which substitutes a rule or order of a superior Court for the old proceeding by mandamus,—to grant a rule to shew cause.

[GROVE, J. Has not the Court a discretion to grant or to refuse a rule?]

That discretion may be exercised when cause is shewn. It is enough if a primâ facie case is made out in the first instance.

LORD COLERIDGE, C.J. I am of opinion that there should be no rule. The 43rd section of 19 & 20 Vict. c. 108 is not imperative; it enables a party who is dissatisfied with the decision of a county court in point of law to apply to a superior Court, where the judge of the inferior court has refused to sign a case, for a rule calling upon the judge to do so, instead of, as before, for a mandamus; but there is nothing to shew that the Court so applied to is obliged to compel the judge to sign it. I am of opinion that it would not tend to any useful purpose to grant a rule here. There is only one point upon the face of the affidavits upon which there could be any pretence for asking for it, viz. the first ground stated, "that there was no evidence of negligence or default of duty on the part of the defendant company conducing to the accident by which the plaintiff's mare was injured." But Mr. Sutton has

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the court [registrar], for the costs of the appeal, whatever be the event of the appeal, and for the amount of the judgment, if he be the defendant and the appeal be dismissed; provided, nevertheless, that such security, so far as regards the amount of the judgment, shall not be required in any case where the judge of the county court shall have ordered the party appealing to pay the amount of such judgment into the hands of the clerk of the court in which such action shall have been tried, and the same shall have been paid accordingly; and the said Court of appeal may either order a new trial on such terms as it thinks fit, or may order judgment to be entered for either party, as the case may be, and may make such order with respect to the costs of the said appeal as such Court may think proper; and such orders shall be final."

Sect. 15 enacts that "such appeal shall be in the form of a case agreed on by both parties or their attorneys, and, if they cannot agree, the judge of the county court, upon being applied to by them or their attorneys, shall settle the case and sign it; and such case shall be transmitted by the appellant to the rule department of the Masters' office of the Court in which the appeal is to be brought."

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shewn us that there was evidence on both sides, and it was for the judge to decide upon the cogency of that evidence. Upon the materials before us, it is impossible for us to say that the judge should have nonsuited the plaintiff. The only effect, therefore, of granting a rule would be to suspend the plaintiff's remedy; for, on cause being shewn, the decision of the county court judge must have been affirmed. As, therefore, the granting or withholding a rule is matter of discretion, I think that discretion is better exercised by refusing it in this case.

BRETT, J. We are asked to grant a rule in order to compel the judge of the county court to settle and sign a case which shall be argued in this Court without further appeal. The application is founded upon s. 43 of 19 & 20 Vict. c. 108, which abolished the old form of proceeding by mandamus. That we have the power to grant such a rule is obvious; but it is equally clear that we may in our discretion refuse to grant a rule nisi if we plainly see that upon cause shewn it must be discharged; otherwise, we should be putting the parties to useless expense. The simple question is whether we ought to force the county court judge to sign a case for appeal when we see that, upon the questions before him, and upon the facts now disclosed to us, on the argument of the appeal his decision could not be objected to. Upon the argument of the appeal, the parties would be bound by the questions put in the case. We must therefore look at the grounds of objection of which notice was given, and see whether any question of law is raised by either of them which could be the subject of an appeal. Now the first is, "that there was no evidence of negligence or default of duty on the part of the defendant company conducing to the accident by which the plaintiff's mare was injured." That *may* be a question of law. The second is, "that, in point of law, upon the facts proved, the plaintiff was wholly responsible for the accident and consequent injury to his said mare." That is a mere suggestion that, upon the facts proved, the judge was bound as matter of law to direct or find a verdict for the defendants. The third is, "that the plaintiff's negligence and want of proper care and precaution contributed to the happening of the said accident, and that therefore he was not entitled to

recover." That is a suggestion that there was contributory negligence, which is purely a question of fact, and not the subject of appeal. The fourth is, "that, on the whole case, and upon the facts generally, the judgment and determination of the learned judge was wrong in point of law." That is nothing more than an allegation that the judgment of the county court judge upon the facts was erroneous. As to the first ground of objection, it appears that one of the parties was dissatisfied with the determination of the judge in point of law, and that they could not agree upon a case. The matter is, therefore, fairly brought within ss. 14, 15 of 13 & 14 Vict. c. 61. But, when it comes before us, it seems that there was evidence on both sides upon which it was necessary to take the opinion of a jury. That being so, and the judge here exercising the functions of a jury, the Court would be bound to hold that the decision was right. It appeared that that part of the station yard where goods were usually delivered was full, and the plaintiff's carter, when he applied for the hay, was told that it was on the siding. That may be assumed to be an intimation to the man that he might go to the siding to get it, which would make the siding a part of the station yard; and the county court judge found, as he might properly find, that the man was guilty of no negligence in going there, that the defendants were bound to use ordinary and reasonable care in keeping the siding safe, and that they had not done so; there was evidence, therefore, upon which the judge might properly come to the conclusion that there had been negligence on the part of the defendants, and no contributory negligence on the part of the plaintiff's servant. Upon these facts appearing before us, as we must have dismissed the appeal, in the exercise of our discretion under s. 43 of 19 & 20 Vict. c. 108, we ought not to grant a rule.

GROVE, J. I am of the same opinion. Mr. Sutton was obliged to go the length of saying that this Court is bound to interfere whenever a case is presented to a county court judge alleging that there is a point of law upon the determination of which either party is dissatisfied, though there be nothing in the argument. Upon reading s. 43, however, it is clear that a discretion is vested in the

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superior Court; and, upon facts being brought before the Court which reasonably satisfy them that a rule, if granted, must inevitably be discharged, it would be idle and injurious to grant a rule. That being so, I agree with my Lord and my Brother Brett that no rule should be granted.

Rule refused.

Nov. 22. *Herschell, Q.C.*, obtained an order in the High Court of Appeal for leave to appeal against this decision.

Dec. 17. *Reginald Brown* shewed cause, and *Herschell, Q C.*, and *H. Sutton*, were heard in support of the appeal.

1 Q.B.D. 256. THE COURT (James and Mellish, L.JJ., and Baggallay, J.A.) held that, the question being one of fact only, there could be no appeal from the decision of the county court judge, and therefore the Common Pleas Division were right in refusing to entertain the motion.

Appeal dismissed, with costs. (1)

Solicitors for plaintiff: *Gray & Mounsey, for Wright & Brown, Carlisle.*

Solicitors for defendants: *R. F. Roberts, and Sauls, Carlisle.*

(1) If this had been an "appeal" from a decision of a county court, instead of a motion under 19 & 20 Vict. c. 108, s. 43, calling upon the judge to settle and sign a case, it would seem that, in the absence of special leave of *this Court* to appeal, its determination would have been final: see 36 & 37 Vict. c. 66, s. 45.

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Nov. 22.

Construction of Private Act—Covenant to Repair—Notice.

The defendants' predecessors in title obtained an Act for the formation of a road which was to pass under a railway by means of a bridge. By the Act it was provided that the undertakers should not enter upon or interfere with the railway, or execute any work whatsoever under or affecting the same, until they should have delivered to the company plans, drawings, and specifications of the works intended to be executed under or affecting the railway and works thereof, such plans, &c., to describe the manner of executing the intended works, and the materials to be used for the purpose, nor until those plans, &c., should have been examined and approved by the engineer of the company; and that "the same works should be executed and thereafter maintained by the undertakers at their sole expense in all things, according to such approved plans, &c., under the superintendence and to the reasonable satisfaction of the engineer of the company." And it was further provided that the undertakers should from time to time be responsible for and make good to the company all costs, losses, damages, and expenses which might be occasioned to the company by reason of the execution or failure of any of the intended works, or of any act or omission of the undertakers, &c.

The bridge was accordingly constructed of brick piers and iron pillars, of iron girders resting upon the piers and pillars, and of timber and wood-work. In the construction of the bridge, the brick and iron work was done by the defendants' predecessors in title, under the superintendence of the plaintiffs' engineer. The timber and wood-work,—the superstructure,—was done by the plaintiffs' engineer at the expense of the undertakers, and with materials provided by them.

The structure was completed in 1864. In 1872 certain repairs became necessary to the superstructure of the bridge, which repairs were executed by the company, who claimed to be reimbursed their outlay in so doing by the defendants, although the defendants had had no notice nor any knowledge or means of ascertaining that the repairs were necessary:—

Held, that the plaintiffs were not entitled to recover the expenses so incurred.

THIS was an action brought to recover 147*l.* 2*s.*, expenses incurred in maintaining a bridge constructed under the Queen's Road, Battersea, Extension Act, 1863, a copy of which Act was annexed to the special case.

1. The bridge in question is the bridge under the London and South Western railway, mentioned in the 8th and 16th sections of the above-mentioned Act; and the defendants are the owners for the time being of Long Hedge Farm, within the meaning of the 2nd section.

2. The bridge is constructed of brick piers and iron pillars, of

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iron girders resting upon the piers and pillars, and of timber and wood-work. In the construction of the bridge, the brick and iron work was done by the defendants' predecessors in title, under the superintendence of the plaintiffs' engineer. The timber and wood-work was done by the plaintiffs' engineer at the expense of the defendants' predecessors in title, and with materials provided by them.

3. The bridge was completed in the year 1864; and, on the road over which it is constructed having been completed and dedicated to the public, the said road was taken to by the Board of Works for the Wandsworth district.

4. The bridge supports the railway lines of the plaintiffs, over which trains are passing and re-passing by day and night at short intervals.

5. During the year between the 31st of March, 1872, and the 31st of March, 1873, repairs became necessary to the superstructure of the bridge. The parts of the bridge needing repair were works maintainable under the last clause of s. 11 of the Act. The necessary repairs were executed by the plaintiffs, and the reasonable costs thereof amounted to 147*l.* 2*s.*

6. No notice was ever given to the defendants of the necessity for such repairs as mentioned in the last paragraph before the execution thereof by the plaintiffs; nor had the defendants any notice of the present claim till the 12th of May, 1873.

7. The bridge, at the times when the repairs in question became necessary, and were executed, was in the exclusive occupation and possession of the plaintiffs. And the fact that the repairs were necessary could only be ascertained by entry upon and examination of the bridge, and, as to some of them, by removing parts of the woodwork of the bridge.

8. The repairs in question were not of such a character as to be of frequent occurrence; they were such as in the ordinary course of things would only become necessary at intervals of from five to ten years, and such as in the ordinary course of business would, when required, be executed once for all, as an entire job.

9. The Court were to be at liberty to draw inferences of fact.

The question for the opinion of the Court was whether the plaintiffs were entitled to recover the amount claimed.

If the opinion of the Court should be in the affirmative, judgment was to be entered for the plaintiffs for 147*l.* 2*s.*, with costs. If the opinion of the Court should be in the negative, judgment was to be entered for the defendants, with costs.

Wood, Q.C. (*Brown, Q.C.*, and *Mangles*, with him), for the plaintiffs. The question in this case turns upon the construction of a local Act of 26 Vict. c. xlvi, authorizing the construction of a new public road from Battersea to Clapham. The Act recites (amongst other things) that the intended road would pass for nearly its entire length through that part of an estate known as "Long Hedge Farm," situated in the parishes of Battersea and Clapham, which is the property of William Woodgate and Philip William Flower. It further recites that, inasmuch as the London and Brighton, the London and South Western, and the London, Chatham, and Dover railways traversed the line of the proposed road and impeded the construction thereof, it was expedient that the powers thereinafter contained should be granted for constructing the road across the railways; that Woodgate and Flowers were willing to construct the road, and that it was expedient that they should be authorized so to do, and to dedicate the same to the public; and that plans and sections shewing the line and levels of the road, &c., and also a book of reference to such plans and sections, had been deposited with the clerk of the peace. By the interpretation clause, s. 2, "the undertakers" are to mean "the said William Woodgate and Philip William Flower, or other the owners or owner for the time being of the said part of the estate known as Long Hedge Farm." Sect. 5 enacts that, "subject to the provisions in this Act and in the Acts and parts of Acts incorporated therewith (1) contained, the undertakers may make and *maintain* the said road in the line according to the levels, and upon the lands delineated on the said plans and sections, and described in the book of reference so deposited as aforesaid." Sect. 8 enacts that "the road shall be made throughout of the width of not less than sixty feet,

(1) The Lands Clauses Consolidation Act, 1845, except ss. 10 and 11 thereof, and ss. 6 to 12 (both inclusive), and ss. 15 and 16 of the Railways Clauses Consolidation Act, 1845.

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except where the same shall be carried by a bridge over the authorized line of the West End of London and Crystal Palace railway, where it shall be of a width of not less than forty feet; and every bridge shall be made to the approbation in all things of the engineer of the Metropolitan Board of Works; and the headway of the iron girder bridge by which the road shall be carried under the London and South Western railway shall be of the height of fifteen feet at the least." By s. 10 it is provided that nothing in the Act contained shall authorize the undertakers to "alter, vary, or interfere with the London and South Western railway, or any of the works thereof, further or otherwise than is necessary for the construction and maintenance under the London and South Western railway of the road by the Act authorized at the point indicated on the deposited plan of that road." Sect. 11, which is the important one, enacts that, "notwithstanding anything in this Act contained, the undertakers shall not, for the purpose of so forming or maintaining the intended road under the London and South Western railway, acquire any ownership of or in any land or property of the London and South Western Railway Company, but only an easement or right so to form and maintain and use the intended road under the London and South Western railway; and the undertakers shall not enter upon or interfere with the London and South Western railway, or any of the land or works of the London and South Western Railway Company, or execute any work whatsoever under or affecting the same, until they shall have delivered to that company plans, drawings, and specifications of the works intended to be executed under or affecting the London and South Western railway and the lands and works thereof, such plans, drawings, and specifications to describe the manner of executing the intended works, and the materials to be used for the purpose, nor until those plans, drawings, and specifications shall have been examined and approved in writing under his hand by the principal engineer of the London and South Western Railway Company, or, in the event of his neglecting or declining to approve the same for one calendar month after such plans, drawings, and specifications shall have been delivered to that company, until the same shall have been so examined and approved by an engineer to be appointed

by the Board of Trade; and *the same works shall be executed and thereafter maintained by the undertakers at their sole expense* in all things according to such approved plans, drawings, and specifications, under the superintendence and to the reasonable satisfaction of the principal engineer for the time being of the London and South Western Railway Company." The 14th section is as follows:—"Notwithstanding anything in this Act contained, the undertakers shall from time to time be responsible for and make good to the London and South Western Railway Company all costs, losses, damages, and expenses which may be occasioned to the London and South Western railway, or to any of the works or property thereof, or to the traffic thereon, or to any person or persons using the same, or otherwise, by reason of the execution or failure of any of the intended works, or of any act or omission of the undertakers, or of any of the persons in their employ, or of their contractors or others; and the undertakers will effectually indemnify and hold harmless the London and South Western Railway Company from all claims and demands upon or against them by reason of such execution or failure, and of any such act or omission." The only other section which is at all material is the 16th, which provides that "The arch or bridge over the intended road at the point where that road crosses under the London and South Western railway and the works connected therewith, shall be of such dimensions and so constructed as to admit of the convenient maintenance on and over the same of four lines of railway at the least; and, if the undertakers be thereunto at any future time required by the London and South Western Railway Company, in writing under their common seal, the same arch or bridge and other works of the undertakers shall be from time to time so widened and enlarged on either or both sides thereof, in the option of the London and South Western Railway Company, as to admit of the convenient maintenance on and over the same of four additional lines of railway, making on the whole eight lines of railway; and all and singular the provisions of this Act with reference to the construction in the first instance and maintenance of the intended road under and in connection with the London and South Western railway, shall apply to the works of and incident to the said widening and enlargement."

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That the expense of the repairs from time to time becoming necessary for the maintenance of the bridge contemplated by the Act was to be borne by the undertakers and their successors in title, will not be disputed. The only question is whether or not they were entitled to notice before the company caused the repairs to be done. Now, it is not immaterial to bear in mind that, when the bridge was first constructed (in 1864), that portion of it which consisted of brick piers, iron pillars, and iron girders, was built by the defendants' predecessors in title under the superintendence of the plaintiffs' engineer; but that the woodwork,—that portion of the structure upon which the rails are laid,—was done by the plaintiffs' engineer at the expense of the undertakers and with materials supplied by them; and that it was this latter portion of the work which required repair. And these repairs, it is obvious, could only be done by the plaintiffs themselves, and could not with safety to the public be suffered to remain undone for any period of time however short. Under these circumstances, the only reasonable construction of the Act is, that such repairs should be done by the plaintiffs themselves, and be paid for by the undertakers, as provided by s. 11. In *Vyse* v. *Wakefield* (1), Lord Abinger, C.B., says: "The rule to be collected from the cases seems to be this, that, where a party stipulates to do a certain thing in a certain specified event which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice unless he stipulates for it: but, where it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given to him. That is the common sense of the matter." And Parke, B., adds (2): "The general rule is, that a party is not entitled to notice, unless he has stipulated for it." Here, the defendants' predecessors were the promoters of the Act, and might have stipulated for notice if they had thought fit. The case finds that, from the nature of the structure, these repairs would be required periodically: and the defendants must be assumed to have been aware of the fact. The entire object of these provisions of the Act would be defeated if the company were bound to give the parties notice of wants of repair which could by no possibility be amended by any one but the company themselves; especially, seeing that there might be

(1) 6 M. & W. 442, 452. (2) 6 M. & W. at p. 453.

some difficulty in ascertaining at the moment who were the successors in title of the original undertakers. [*Colley* v. *Streeton* (1) was also referred to.]

Day, Q.C. (*Finlay* with him), for the defendants. There is nothing in the Act of Parliament in question to entitle the railway company themselves to repair the bridge and to charge the defendants with the expenses so incurred,—at all events, not without first giving them notice that repairs were wanted, and giving them an opportunity of doing them. The case is decided by *Makin* v. *Watkinson.* (2) It was there held that, where a lessee had covenanted to keep in repair the main walls, main timbers, and roofs of the demised premises, he could not be sued for a breach unless he had notice that the premises were out of repair. Channell, B., there says: "Here, repairs are to be done to the exterior of the premises, as to which it is just possible that the lessor might by observation acquire a knowledge of their necessity. But the main timbers of the building, which must be within its carcase, are to be kept in repair; and of the repairs required for these he could have no knowledge without notice. He could not enter to see the condition of those parts, even though, independently of his obligation under the covenant, it might be of great consequence to him to be acquainted with it. Here, therefore, by the rule of common sense, which is supported by the case of *Vyse* v. *Wakefield* (3), we ought to import into the covenant the condition that he shall have notice of the want of repair before he can be called upon under the covenant to make it good." Bramwell, B., concurred in that decision, though Martin, B., inclined to dissent. [He was stopped by the Court.]

Wood, Q.C., in reply, relied upon Baron Martin's judgment in *Vyse* v. *Wakefield* (3), and contended that, to hold a notice to be necessary in this case would be importing into the Act of Parliament words which are not found there.

BRETT, J. In this case the plaintiffs are in the exclusive possession of a bridge over which their railway runs, which bridge was built by and at the expense of the defendants' predecessors in

(1) 2 B. & C. 273. (2) Law Rep. 6 Ex. 25.
(3) 6 M. & W. 442.

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title under the powers of a Road Act of 26 Vict. c. xlvi. The bridge, which the defendants were bound to repair, becoming dilapidated, the plaintiffs proceeded to do the necessary repairs to it, and this without notice to the defendants of the want of repair, and without first calling upon them to put the bridge in repair. Now, unless the Act of Parliament expressly gives the plaintiffs the right to do this work without request, and to charge the defendants with the cost thereof, I know of no principle of law upon which the plaintiffs' claim can be sustained. The question therefore is, what is the true construction of the Act,—whether it gives the plaintiffs power to do the necessary repairs to the bridge without first giving notice of the want of repair to the defendants and calling them to repair. I am of opinion that the Act gives the plaintiffs no such authority. I will assume that the defendants were by the Act bound to maintain the bridge in a proper state of repair. I will assume also that by implication they had a right to go upon the railway for the purpose of examining the condition of the bridge and ascertaining whether or not it needed repair. But I must take into consideration the nature of the bridge, viz. that it is in the exclusive possession of the company and used exclusively by them for the traffic along their railway, and that it might be out of repair in such a way that the want of repair might not be ascertainable upon an examination such as the defendants could make. Upon the statements and findings in the case, it is obvious that this is a bridge the want of repair of which might be known to the plaintiffs without being known to the defendants, and that very serious consequences might result from any delay in putting the structure in a proper condition to sustain the traffic. The question is whether, the want of repair being known to the plaintiffs, and being of such a nature as not to be necessarily or even probably known to the defendants, the former can, without giving the latter any notice, do the repairs themselves and charge them with the costs. It would, I think, be a very strong thing if the Act did give the plaintiffs this power specifically: and I am unable to see that it does so. Mr. Wood contends that the plaintiffs have this power by necessary implication. I cannot agree with him. When the want of repair is known to the plaintiffs, who are in the exclusive possession of the structure, and is not and

cannot with reasonable diligence be known to the defendants, it would seem to be contrary to natural justice to hold that the plaintiffs can, without giving the defendants notice of the duty which is sought to be cast upon them, take upon themselves to perform that duty for the defendants and charge them with the expense. It seems to me that the doctrine laid down in *Makin* v. *Watkinson* (1) will materially help us in coming to a right construction of this Act. The Act is not a contract between the parties, but it is next door to it: and I decide this case upon the ground that the doctrine of *Makin* v. *Watkinson* (1) is as applicable to the construction of an Act of Parliament as to that of an ordinary contract. The reason of the thing is this, that, where there is knowledge in the one party and not in the other, there notice is necessary. Any other construction would seem to me to be contrary to natural justice, and ought not to be adopted by mere implication, but must rest upon the express enactments of the statute. For these reasons, I am of opinion that the defendants are not liable in this case. Reliance was placed upon the 14th section of the Act. But that section does not enable us to make the implication suggested: it manifestly has reference to omissions to do something after notice. In doing the repairs in question the plaintiffs were mere volunteers: they were under no legal obligation to do them. And I see nothing in the Act which either expressly or by implication casts upon the defendants the obligation to repay the plaintiffs the expense which they have thought fit to incur. I am therefore of opinion that our judgment should be for the defendants.

DENMAN, J. I am of the same opinion. If the thing complained of here had been an omission on the part of the undertakers in the execution by them of any duty imposed upon them by the Act, the plaintiffs might have been entitled to recover. But in my judgment this is not a case of omission within the meaning of s. 14. We must see, then, what it is that the undertakers are required by the Act to do. Their duty is pointed out in s. 11. Before commencing to build the bridge in question, the undertakers are to submit for the approval of the principal

(1) Law Rep. 6 Ex. 25.

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engineer of the company "plans, drawings, and specifications to describe the manner of executing the intended works, and the materials to be used for the purpose:" and then the section goes on,—"and the same works shall be executed *and thereafter maintained by the undertakers at their sole expense* in all things according to such approved plans, drawings, and specifications under the superintendence and to the reasonable satisfaction of the principal engineer for the time being of the company." The case of lessor and lessee is very analogous. One of the first principles of natural justice is, that, where a party is required, whether by a private contract or by an Act of Parliament, to do an act the doing of which is contingent upon the necessity for it arising at some uncertain time, before he can be charged with a breach of duty in not doing the act, he must have notice that the time for doing it has arrived, so as to have an opportunity of performing his obligation. A striking instance of that is to be found in the case of *Cooper* v. *Wandsworth District Board of Works.* (1) Further, I think that, as the 14th section of the Act requires the undertakers, not simply to erect and maintain the bridge, but to do it to the satisfaction of the engineer of the company, the necessity for holding that what is to be done is to be done after notice from the company is made abundantly manifest. This seems to me to be the natural and legitimate construction of the Act of Parliament. The company, therefore, not having given the defendants notice of the want of repair of the bridge in question, it was not competent to them to do the work themselves and call upon the defendants to pay for it. They cannot rely on s. 14, because there could be no omission on the part of the defendants until they had been set in motion by a notice.

LINDLEY, J. I am of the same opinion. I am desirous of excluding the case of inability on the part of the defendants to ascertain whether or not the bridge was defective, and also the case of mutual ignorance of the existence of defects. The case we have to deal with is that of the plaintiffs knowing the bridge to be out of repair and giving the defendants no notice of that fact, but doing the repairs themselves and then calling upon the defendants

(1) 14 C. B. (N.S.) 180; 32 L. J. (C.P.) 185.

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to repay them the expenses they have incurred. I am of opinion that they cannot do that. And I base my opinion upon the case of *Makin* v. *Watkinson* (1), and upon the plain meaning of the Act. I cannot read the 11th section of the Act without seeing that the minds of both parties are to be consulted with regard to the repairs. The defendants are only bound in a qualified manner to maintain the works, viz. according to plans, drawings, and specifications approved by the principal engineer of the company, and under his superintendence. The defendants could not do this without consulting the plaintiffs: still less could the company repair the bridge without giving notice to the defendants that it required repair, and calling upon them to repair it.

Judgment for the defendants.

Solicitor for plaintiffs: *Lewis Crombie.*
Solicitors for defendants: *W. & J. Flower & Nussey.*

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Nov. 30.

Mayor's Court, London, Jurisdiction of—Order for Goods by a Letter posted in the City, accepted by Delivery in the City.

The defendant, who carried on business in the city of London, posted a letter there containing an order for goods, addressed to the plaintiff in Surrey. No letter was sent accepting the offer; but the goods were taken by a servant of the plaintiff and delivered to the defendant in London:—

Held, that the whole cause of action arose in the city.

THE plaintiff sued the defendant in the Mayor's Court, London, for 11*l.* 4*s.* for goods sold and delivered under the following circumstances:—The defendant, who was an importer and manufacturer of sewing-machines carrying on business in Bury Street, St. Mary Axe, in the city of London (which is within the jurisdiction of the Mayor's Court), on the 3rd of April last, wrote and sent by the post a letter addressed to the plaintiff, who is a wholesale perfumer carrying on business in Red Cross Street, Southwark, in the county of Surrey, containing an order for a quantity

(1) Law Rep. 6 Ex. 25.

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of Brown Windsor Soap; the plaintiff did not answer this letter, but on the 14th he executed the order by sending his servant with the goods to the defendant at Bury Street, St. Mary Axe, where the defendant accepted them.

On the 17th of August, the defendant, upon an affidavit that the whole cause of action did not arise within the city of London, obtained a writ of prohibition out of the petty-bag office of the High Court of Chancery, under 12 & 13 Vict. c. 109, s. 39; and on the 13th of November the plaintiff obtained an order of Lush, J., to set aside the prohibition, on the ground that the order for the goods and the delivery both took place within the jurisdiction of the Mayor's Court.

Lumley Smith moved to set aside the order of Lush, J., and for the issue of a prohibition out of this Court. The order for the goods having been sent by post to the plaintiff's place of business outside the city of London, the whole cause of action did not arise within the jurisdiction of the Mayor's Court, and therefore prohibition lies. The only question is whether the order was given at the place where the letter was posted by the buyer, or where it was received by the seller. The case is governed by *Evans* v. *Nicholson* (1), where it was held that letters containing admissions of a debt for goods sold within the city but delivered to the buyer without the jurisdiction of the city court, which letters were posted by the buyer out of the city but received by the seller within it, constituted an account stated at the place where the letter was posted and at the time when it was posted.

[LORD COLERIDGE, C.J. This matter was very much discussed in *Harris's Case* (2), where it was held that a contract is complete when a letter has been posted accepting an offer which can be accepted by a letter so sent. Lord Justice Mellish there says (3): "When a person in one part of the country writes to a person in another part of the country a letter containing an offer, and either directly or impliedly tells him to send his answer by post, and an answer accepting that offer is returned by post, when is a complete contract made? Is it made at the time when the

(1) 32 L. T. 778. (2) Law Rep. 7 Ch. 587.
(3) Law Rep. 7 Ch. at p. 593.

letter accepting the offer is put into the post? or is it not made until that letter is received? It was contended before us that it is not made until the letter is received; so that until it is received the contract may be revoked by the person who has made the offer. Now, throughout the argument, I have been forcibly struck with the extraordinary and very mischievous consequences which would follow if it were held that an offer might be revoked at any time until the letter accepting it had been actually received. No mercantile man who has received a letter making him an offer, and has accepted the offer, could safely act on that acceptance after he has put it in the post until he knew that it had been received. Every day, I presume, there must be a large number of mercantile letters received which require to be acted upon immediately. A person, for instance, sends an order to a merchant in London offering to pay a certain price for so many goods. The merchant writes an answer accepting the offer, and goes that instant into the market and purchases the goods in order to enable him to fulfil the contract. But, according to the argument presented to us, if the person who has sent the offer finds that the market is falling, and that it will be a bad bargain for him, he may at any time before he has received the answer revoke his offer. The consequences might be very serious to the merchant, and might be much more serious when the parties are in distant countries." And, after referring to *Adams* v. *Lindsell* (1) and *Dunlop* v. *Higgins* (2), he comes to the conclusion that the contract is made from the time when it is accepted by post.]

All these are cases of offers, to be accepted by post. It is the acceptance of the offer that creates the contract, as was said in argument in the last-mentioned case. (3) It is the same as if the buyer in this case had sent his servant from the city to Southwark to give the order, and the seller had accepted it there. The post is the agent of the sender of the letter: *Duncan* v. *Topham*. (4)

[LORD COLERIDGE, C.J., referred to *Hurdle* v. *Waring*. (5)]

E. Clark, contrà. The observations of Lord Justice Mellish in

(1) 1 B. & Ald. 681.
(2) 1 H. L. C. 381.
(3) 1 H. L. C. at p. 388.
(4) 8 C. B. 225.
(5) Law Rep. 9 C. P. 435.

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Harris's Case (1) are fairly conclusive of this question. The order here was given in the city, and the contract was completed by the delivery of the goods to the purchaser within the city. *Wall's Case* (2) is an authority to the same effect.

[AMPHLETT, B. If a letter had been sent accepting the offer and posted in Southwark, then a part of the contract might have been said to have been made there.

LORD COLERIDGE, C.J. Lord Cottenham, in *Dunlop* v. *Higgins* (3), adopts the judgment of Lord Ellenborough in *Adams* v. v. *Lindsell.* (4)]

And that case was followed in *Harris's Case.* (1)

LORD COLERIDGE, C.J, I am of opinion that my Brother Lush was quite right, and that the present case falls within the authorities recently discussed and considered in this Court. The order for the goods was given by the buyer in the city, by means of a letter posted there addressed to the seller who resided in Southwark. There was no letter accepting the order: but the transaction was completed by the seller sending his servant with the goods and delivering them to the buyer at his place of business within the city. I say the order was given in the city, because I see no distinction in principle (and there is none in any of the authorities) between the case of a letter accepting an offer and a letter containing an order for goods. The language of Lord Justice Mellish in *Harris's Case* (1) shews that in his mind there is no such distinction. The order, then, having been given in the city where the letter conveying it was posted, the contract was complete when the goods were delivered by the seller to the buyer in the city. No part of the cause of action, therefore, arose out of the jurisdiction of the Mayor's Court. *Dunlop* v. *Higgins* (5), in the House of Lords, binds us all. The decision of this Court in *Duncan* v. *Topham* (6), and that of Lord Ellenborough and the Court of Queen's Bench in *Adams* v. *Lindsell* (4), were there reviewed and the principle adopted. And that judgment covers to the full the ground upon which we are proceeding.

(1) Law Rep. 7 Ch. 587.
(2) Law Rep. 15 Eq. 18.
(3) 1 H. L. C. at p. 400.
(4) 1 B. & Ald. 681.
(5) 1 H. L. C. 381.
(6) 8 C. B. 225.

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ARCHIBALD, J. I am of the same opinion. The order was given in the city to a person residing out of the city; and the goods were delivered to the defendant within the city. *Dunlop* v. *Higgins* (1) decides that a letter containing an offer speaks from the time when and the place where it is posted. It was upon that principle that the recent case of *Evans* v. *Nicholson* (2) was determined in this Court. Here there was a complete order when the buyer posted the letter ordering the goods; and the acceptance of it was the sending the goods into the city and there delivering them to the buyer. My Brother Lush was quite right in setting aside the writ of prohibition.

AMPHLETT, B. I am quite of the same opinion. The question is, where was the contract in this case made? The moment the defendant's letter containing the order was put into the post there was a good offer made. If the seller had posted in Surrey a letter accepting the offer, I should have thought that the contract was made at the place where the offer was accepted. But there was no letter: the goods were delivered in the city. Every part of the cause of action, therefore, arose within the city.

Rule refused, with costs.

Solicitors for plaintiff: *Crook & Smith.*
Solicitors for defendant: *Ford & Lloyd.*

(1) 1 H. L. C. 381. (2) 32 L. T. 778.

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Nov. 5.

SMITH *v.* GREEN.

Breach of Warranty on the Sale of a Cow—Foot and Mouth Disease—Measure of Damages.

9 QBD. 104
111
— 332,

The defendant sold a cow to the plaintiff, a farmer, with a warranty that she was free from foot and mouth disease. The plaintiff placed the cow (which had the disease) with other cows, and some of these became infected with the disease, and died, as also did the cow in question :—

Held, that the defendant was liable in damages for the entire loss, if when he sold the cow he knew that the plaintiff was a farmer, and that he would or probably might place the infected cow with others.

THE first count of the declaration was for the breach of an alleged warranty that a cow sold by the defendant to the plaintiff was free from foot and mouth disease; the second alleged that the defendant falsely and fraudulently represented the animal to be free from foot-and-mouth disease; and the damage alleged was that the plaintiff, who was a farmer, allowed the cow to herd with other cows, some of which took the disease and (with the cow in question) died.

The cause was tried before Archibald, J., at the last summer assizes at Manchester. Upon a conflict of evidence, the jury found that the defendant had warranted the cow at the time of the sale to be free from foot and mouth disease, but they negatived the alleged false representation. It was proved that the animal was at the time suffering under the disease in question, and communicated it to other cows belonging to the plaintiff with which she had, in the ordinary course of the plaintiff's business of a farmer, been placed, and that she and several of them in consequence died.

On behalf of the defendant it was contended that, upon a mere breach of warranty, he was not responsible for the loss of the other cows, though he would have been so if he had been guilty of a false representation.

The learned judge, however, in his summing-up, told the jury that, in estimating the damages the plaintiff was entitled to re-

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cover in respect of the breach of warranty, they might take into their consideration the fact that the buyer was a farmer, and that the seller knew, or must be taken to have known, that the cow in question would be placed with other cows, and that the consequences which had resulted might naturally be expected to happen.

The jury returned a verdict for the plaintiff, with 50*l.* damages; and leave was reserved to the defendant to move to reduce the damages to 8*l.* if the Court should be of opinion that they ought to be confined to the value of the cow sold.

Pope, Q.C., moved for a new trial on the ground of misdirection, or to reduce the damages. It may be conceded that, if the defendant had fraudulently represented the cow to be free from infectious disease, when he knew that she was not so, and the death of the other cows had resulted from the plaintiff's having in ignorance allowed the cow in question to herd with them, the plaintiff would have been entitled to recover their value as well as that of the animal which he bought; for, in that case, the loss would have been the natural result of the defendant's misrepresentation. It was so held in *Mullett* v. *Mason*. (1) The judgments of Erle, C.J., and Willes, J., there proceeded entirely on the ground of fraud. *Borradaile* v. *Brunton* (2), *Langridge* v. *Levy* (3), *Hadley* v. *Baxendale* (4), *Dingle* v. *Hare* (5), *Randall* v. *Raper* (6), and *Hill* v. *Balls* (7), were cited in argument; and in all of these there was fraud or misrepresentation. No case can be found where the same measure of damages has been awarded for a mere breach of warranty.

[GROVE, J. referred to *Bain* v. *Fothergill*. (8)]

In that case the gun was used in reliance upon the fraudulent representation by the seller that it was a fit and safe one. But, in the case of a simple warranty of soundness, to induce the plaintiff

(1) Law Rep. 1 C. P. 559.

(2) 8 Taunt. 535.

(3) 2 M. & W. 519.

(4) 9 Ex. 341; 23 L. J. (Ex.) 179.

(5) 7 C. B. (N.S.) 145; 29 L. J. (C.P.) 143.

(6) E. B. & E. 84; 27 L. J. (Q.B.) 266.

(7) 2 H. & N. 299; 27 L. J. (Ex.) 45.

(8) Law Rep. 7 H. L. 158.

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to buy the animal, it may well be that the true measure of the damages is the sum paid for it.

LORD COLERIDGE, C.J. I am of opinion that there should be no rule in this case. The action is brought for the breach of a warranty upon the sale of a cow, that she was free from foot and mouth disease; and it appeared that the cow was at the time of the sale affected with that disease, and that the buyer, who was a farmer, having placed her along with other cows, the disease was communicated to them, and that she and some of them died. Besides a count upon the warranty, the declaration contained a count charging the defendant with a false and fraudulent representation that the cow in question was free from the complaint; but the jury negatived the alleged fraud. We are asked to grant a new trial on the ground that my Brother Archibald misdirected the jury in telling them that, in estimating the damages to which the plaintiff was entitled for the breach of warranty, they might take into their consideration the fact that the buyer was a farmer, and that the seller knew, or must be taken to have known, that the diseased cow would be placed with other cows; and that, if they found that the defendant knew that fact, and that in the ordinary course of his business the plaintiff would so place her, then the loss of the other cows might fairly be considered to be the natural and necessary consequence of the defendant's breach of warranty, and they might assess the damages accordingly. I am of opinion that that direction was perfectly correct, and that the jury were quite right in taking that circumstance into account. The facts seem to me to bring the case clearly within the rule laid down by the Court of Exchequer in *Hadley* v. *Baxendale.* (1) It is not necessary to consider whether the representation as to the state of the cow which was the subject of sale was fraudulent or not, because the rule is, that, where a party to a bargain makes an untrue statement as to the subject of sale, and damage results therefrom to the other party, the seller is answerable for such damage. *Randall* v. *Raper* (2) proceeds upon that footing. There was no fraud there; but the

(1) 9 Ex. 341; 23 L. J. (Ex.) 179.
(2) E. B. & E. 84; 27 L. J. (Q.B.) 266.

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defendant sold seed which turned out to be of a kind different from that which he warranted it to be, and the plaintiff having sown it and a wrong crop having come up, he was held entitled to recover the difference in value of the crop as it was and as it ought to have been. In giving judgment, Lord Campbell says (1): "It was a probable, a natural, and a necessary consequence of this seed not being chevalier barley that it did not produce the expected quantity of grain. That is a consequence not depending upon the quality of the soil, but one necessarily resulting from the breach of contract as to the quality of the seed." And Erle, J., said (2): "The warranty is, that the barley sold should be chevalier barley. The natural consequence of the breach of such a warranty is, that the barley which has been delivered having been sown, and not being chevalier barley, an inferior crop has been produced. This damage naturally results from the breach of the warranty, and the ordinary measure of it would be the difference in value between the inferior crop produced and that which would have been produced from chevalier barley: that is not inconsistent with *Hadley* v. *Baxendale*. (3)" There are many other cases (some of which have been cited) to the same effect. It seems to me that my Brother Archibald correctly laid down the law in accordance with those authorities; and, it being fairly admitted that there was evidence on both sides, and the learned judge not being dissatisfied, I see no reason to doubt that the jury came to a right conclusion.

BRETT, J. I am of the same opinion. We are not called upon to decide in this case whether a defendant is liable to a greater measure of damages for a fraudulent misrepresentation on the sale of a horse, or a cow, or any other chattel, than for a breach of warranty. I think it better to follow the example of the Court in *Mullett* v. *Mason* (4), and to decline to give any judgment upon a point which does not fairly arise before us. The sole question here is, whether, on a breach of warranty like this, the damages to be recovered fall within the ordinary rule that they must be so far the natural consequence of the breach, that they must have

(1) E. B. & E. at p. 88.
(2) E. B. & E. at. p. 89.
(3) 9 Ex. 341; 23 L. J. (Ex.) 179.
(4) Law Rep. 1 C. P. 559.

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been in the minds of both of the contracting parties at the time of the contract. In *Hill* v. *Balls* (1), which was the case of a sale of a glandered horse by auction at a repository, it seems to have been considered that the infecting of other horses was not to be taken to be the natural consequence of the sale of a diseased animal, so as to bring the case within the rule we are dealing with. That case was decided upon a demurrer to declaration which contained no allegation of either false representation or warranty. Here, however, my Brother Archibald seems to have avoided all difficulty by leaving the question to the jury in the manner he did. In effect, he left it to them to say whether the facts brought the case within the rule I have mentioned or not; telling them that the plaintiff's right to recover these damages must depend upon whether or not the defendant knew that the plaintiff was a farmer, and whether he knew, or ought to have known, that the cow in question would be placed with a herd; and that, if he did, he must have known that the natural consequence would be that other cows would or might be infected with the disease. If so, the infection of the herd was the natural consequence of the defendant's breach of warranty.

GROVE, J. Great difficulty, no doubt, arises from the use of the word "natural" in these cases. It is used by Lord Campbell and by Erle, J., in *Randall* v. *Raper* (2), and has been used in many cases: and it may not be easy to substitute a better word to express what is meant. Normal, or likely or probable of occurrence in the ordinary course of things, would perhaps be the more correct expression. The direction to the jury here seems to me to come strictly within that definition. Unless the cow in question was kept in solitary confinement, it would naturally be expected to herd with other cows. It is unnecessary on the present occasion to go into the distinction between breach of warranty and fraud. The consequences which resulted in this case may reasonably be presumed to have been in the contemplation of the parties at the time of the contract, and likely to occur. I agree

(1) 2 H. & N. 299; 27 L. J. (Ex.) 45.

(2) E. B. & E. 84; 27 L. J. (Q.B.) 266.

with my Lord and my Brother Brett, that there should be no rule.

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Rule refused. (1)

Solicitor for defendant: *J. Letts, for J. H. Law, Manchester.*

MASPER AND WIFE *v.* BROWN.

Feb. 3.

Assault—Summary Conviction a Bar to Action—Action by Husband for assaulting Wife—24 & 25 Vict. c. 100, *s.* 45—"*Same Cause.*"

The defendant assaulted the female plaintiff, and for such assault was fined by the justices under 24 & 25 Vict. c. 100, and paid the fine:—

Held, that an action by the husband in respect of the consequential damage to himself by reason of the assault on his wife was barred under the 45th section of the Act.

DECLARATION for an assault on the wife of the male plaintiff.

2nd count for the damages occasioned to the husband by the assault on his wife, viz. loss of society, medical expenses, &c.

Plea: the substance of which was, that the alleged trespass was a common assault in respect of which the female plaintiff had made a complaint before the magistrates, and that the defendant was convicted by them and fined the sum of 10*s.* and ordered to pay the costs, and that the defendant had duly paid such fine and costs.

(1) See *Jeffrey* v. *Bigelow*, 13 Wend. (New York) 518. An agent authorized to sell a flock of sheep, sold a portion of them with knowledge that they were diseased, and the diseased sheep were mixed with another flock; and it was held that the claim of the purchaser against the principal was not limited to the loss of the sheep purchased, but extended to that of the others to which the disease was communicated. Savage, C.J., there says: "This damage was the natural consequence of the fraudulent act of the defendant's agent." And, after citing a passage from Pothier (Part 1, c. 2, art. 3, pl. 166), to this effect,—"If a person sells me a cow which he knows to be infected with a contagious distemper, and conceals this disease from me, such concealment is a fraud on his part which renders him responsible for the damage, and I suffer, not only in that particular cow which is the object of his original obligation, but also in my other cattle to which the distemper is communicated, for it is a fraud of the seller which occasions this damage," . . . He adds: "The damages were therefore the natural consequences of the fraudulent act of the defendant's agent."

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MASPER v. BROWN.

Demurrer and joinder. (1)

Henn Collins, for the plaintiff, contended that "cause" in the section meant cause of action, and that the husband's cause of action was not the assault per se but the consequential damage arising from the assault; that the section only barred an action for the same cause, and consequently that the plea was bad. [He cited *Brockbank* v. *Whitehaven Ry. Co.* (2)]

No one appeared in support of the plea.

LORD COLERIDGE, C.J. The question in this case is whether this action is a proceeding "for the same cause" as the proceeding before the magistrates. I think it is, and that the words of the 45th section are not fairly satisfied unless they are read as meaning that the proceedings there mentioned shall be a bar to all further proceedings at whosesoever instance for the same assault. It seems to me that the word "cause" is equivalent in that section to the word "assault." This conclusion is fortified, in my opinion, by a reference to 16 & 17 Vict. c. 30, s. 1. There provision is made for the punishment in a summary way of aggravated assaults upon women (including married women) and children; and it is provided that a conviction under that section "shall be a bar to all future proceedings, civil or criminal, for or in respect of the same assault." It seems to me to be clear that the legislature meant the same thing in both these sections. It would be a very strange thing that the legislature, when dealing with aggravated assaults only, should have intended to make the conviction a bar to all further proceedings against the offender for the same assault, and then, when dealing with unaggravated assaults as well as aggravated assaults, they should have intended the conviction to be only a bar to proceedings for the same cause of action, and consequently that the party should be left open to

(1) 24 & 25 Vict. c. 100, s. 45: "If any person, against whom any such complaint, as in either of the three preceding sections mentioned, shall have been preferred by or on behalf of the party aggrieved, shall have obtained such certificate, or having been convicted, shall have paid the whole amount adjudged to be paid, or shall have suffered the imprisonment or imprisonment with hard labour awarded, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause."

(2) 7 H. & N. 834; 31 L. J. (Ex.) 349.

proceedings by as many persons as might stand in such a relation to the person assaulted as to entitle them to maintain an action for consequential injuries resulting from the assault, as, for instance, a husband or master. The two sections are in pari materiâ, and we may well look at one to explain the meaning of the other. It may further be observed that the release is from all further proceedings, civil or criminal. A criminal proceeding is not in respect of a cause of action. For these reasons I think our judgment must be for the defendant.

DENMAN, J. I am of the same opinion. The Act cited by my Lord appears to be quite sufficient ground for our decision. The Acts are in pari materiâ, and, looking to the subject matter, it seems unreasonable to suppose that the legislature did not intend to go as far in the later Act as in the former. The provisions of the former Act quite do away with any argument which might have been raised as to the improbability of the legislature's intending to interfere with rights other than those of the party prosecuting before the magistrates, as, for instance, the right of the husband to sue for consequential damage.

LINDLEY, J. I am of the same opinion. I feel no doubt that the word "cause" in this section means the same thing as "assault." The only doubt I have felt is this: the person is to be released from all further proceedings. Proceedings by whom? Does it mean proceedings by the person assaulted, or by any person? I think it means the latter; and so, also, I think the language of 16 & 17 Vict. c. 30, s. 1, refers to proceedings by any person, for these reasons. Both statutes provide, not only for prosecutions by the persons assaulted, but for prosecutions on their behalf. If a husband or master could prosecute, the meaning must be that the conviction should operate as a bar, not only between the person assaulted and the offender, but also between all other persons suffering consequential damage and the offender. For these reasons I agree that our judgment should be for the defendant.

Judgment for the defendant.

Solicitors for plaintiff: *Chester, Urquhart, & Co., for Richardson.*

1876
Jan. 15.

SOUTHWELL AND ANOTHER *v.* BOWDITCH.

Sale of Goods—Contract for—Broker—Principal and Agent—Sold Note—Personal Liability of Broker.

The defendant, a broker, signed and sent to the plaintiffs a note of a contract in the following terms:—"I have this day sold by your order and for your account to my principals about five tons of pressed anthracene. . . . W. A. Bowditch":—

Held, that the defendant might be made personally liable, in an action for goods sold and delivered, upon the contract.

DECLARATION for goods sold and delivered; plea, never indebted.

Issue.

At the trial before Lord Coleridge, C.J., at the sittings in London after Michaelmas Term, 1874, the facts, so far as material, appeared to be as follows:—The contract of sale relied on by the plaintiffs was a sold note signed by the defendant, who was a colonial broker, in the following terms:—"Messrs. W. A. Southwell & Co. I have this day sold by your order and for your account to my principals about five tons of pressed anthracene, guaranteed to contain about 70 per cent. of pure anthracene, at five shillings per cwt. of pure anthracene, to be delivered free to 'Free Trade Wharf' in casks in good export condition. The percentage of pure anthracene for value to be referred to Dr. B. Paul, who is to test in the following manner: [then followed a description of the manner of testing]; payment in cash in fourteen days after delivery, less $2\frac{1}{2}$ per cent. discount and 1 per cent. brokerage. The above anthracene to be made all from coal tar. W. A. Bowditch." It was contended for the plaintiffs that this document amounted to a contract of sale, making the defendant personally liable for the price of the goods delivered under it. It was contended for the defendant that the note did not import personal liability on the defendant's part, The defendant had acted, in buying the goods, as broker for a firm of Bloth & Co. The verdict was entered for the plaintiffs for 325*l.*, leave being reserved to the defendant to move to enter a nonsuit on the ground that there was no evidence to render the

defendant liable for goods sold and delivered. A rule nisi had been obtained accordingly, against which

Aspland (*Benjamin, Q.C.*, with him), shewed cause. He contended that the defendant was liable as a principal upon the contract: *Pennell* v. *Alexander* (1); *Armstrong* v. *Stokes* (2); *Higgins* v. *Senior* (3); *Humfrey* v. *Dale* (4); *Fleet* v. *Murton* (5); *Fairlie* v. *Fenton* (6); *Cropper* v. *Cook* (7); *Parker* v. *Winlow.* (8)

Cohen, Q.C., A. L. Smith, and *Purvis* supported the rule. It has been established by the decisions that the broker's position is that of middleman, and that he is not entitled to put himself into the position of a principal: *Robinson* v. *Mollett* (9); *Sharman* v. *Brandt* (10); *Hutchinson* v. *Tatham.* (11) The true construction of the sold note is, that it is merely a record for the information of the broker's principal of the manner in which his instructions have been carried out. If it is a contract at all by which the broker is bound as a principal, it is not a contract of purchase by the broker. He does not purport to have bought the goods, but to have sold them to others in pursuance of the seller's instructions. It may be that the broker warrants by this document that he has performed his obligations by so selling them; but the present action is not on any such warranty, but for goods sold and delivered. The decision in *Humfrey* v. *Dale* (4) has been much doubted.

LORD COLERIDGE, C.J. I am of opinion that this rule should be discharged. The principles of law by which this case must be determined have not been seriously in dispute during the argument. Mr. Cohen has admitted that if the words of the document had been "I have this day bought of you," &c., he would have been out of Court. For he admitted that the current of the decisions is too strong for him to contest the proposition that when a man signs a contract in his own name without any qualifi-

(1) 3 E. & B. 283; 23 L. J. (Q.B.) 171.
(2) Law Rep. 7 Q. B. 598.
(3) 8 M. & W. 834.
(4) E. B. & E. 1004; 27 L. J. (Q.B.) 390.
(5) Law Rep. 7 Q. B. 126.
(6) Law Rep. 5 Ex. 169.
(7) Law Rep. 3 C. P. 194.
(8) 7 E. & B. 942; 27 L. J. (Q.B.) 49.
(9) 33 L. T. 545.
(10) Law Rep. 6 Q. B. 720.
(11) Law Rep. 8 C. P. 482.

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cation, even although in the body of the document there may be some expressions tending to shew that he is acting for another, he must nevertheless be taken to have intended to bind himself as a principal. A very strong authority to this effect is the case of *Paice* v. *Walker* (1), where the Court of Exchequer held that a person who had signed a contract in his own name, in the body of which he described himself as agent for a named principal, was personally liable on the contract. Without expressing any opinion on the correctness of these decisions, it is sufficient to say that they exist and are binding on us. It is, therefore, the law that when a party signs in his own name, in the absence of absolutely clear evidence in the contract itself that he signs merely as agent, he will be bound as a principal. But it is argued in this case that in the document before us the defendant did not profess to purchase either as principal or agent, but that it is only a statement that he had executed an order of the plaintiffs and sold the goods in question to his principals in pursuance of such order; in other words, that the document is not a contract of purchase at all. We are here dealing with a common form of document, well known to every one who has had anything to do with mercantile matters, and to give the note such a construction as is suggested would, it appears to me, be going contrary to its well-known meaning among mercantile men. I will only refer to two of the cases that have been cited on the subject. No answer has been given in my opinion to the argument that arises upon them. In *Humfrey* v. *Dale* (2) and *Fleet* v. *Murton* (3) it was sought to render the broker liable upon documents, that, though perhaps not in identical terms with that now in question, were substantially and in every material respect similar. The whole argument in those cases proceeded on the assumption that a document such as this is a contract of purchase. The only question raised was, whether the broker who signed was liable upon it as a principal, and it was never disputed that it was a contract of purchase as against some one.

I will not rely so much on the distinct statements of Crowder and Williams, JJ., that words such as those used here import a

(1) Law Rep. 5 Ex. 173. (2) E. B. & E. 1004; 27 L. J. (Q.B.) 390.
(3) Law Rep. 7 Q. B. 126.

(2 S.C. 3 Jur. N.S. 213. 5 W.R. 191

contract of purchase, as upon the broad fact that all the judges and counsel in those cases must have overlooked an objection which would have disposed of the case instantly, and which lay at the very threshold of the argument, if the defendant's contention is correct. It is incredible that such can have been the case; the only explanation appears to me to be that those engaged in the argument and decision of the case, being well acquainted with mercantile matters, knew that the business-meaning of such a document was that it imported a contract of purchase. The Court of Queen's Bench assumed at the outset that the meaning of the document was such, whether taken by itself or read by the light of the evidence of custom given in the case. The whole of the argument in these cases was unnecessary, and the decision was without force, if such an assumption had not been made. With the greatest respect for the ingenuity of the defendant's counsel, I cannot think that it was reserved for them, after the contrary had so long been assumed, to discover now for the first time the true construction of such a document as this. If this is a contract of purchase, as I before said, it is admitted that the authorities are overwhelming to shew that, the signature in the defendant's own name being unqualified, he is personally liable. For these reasons I think the verdict was right, and should stand.

GROVE, J. I am of the same opinion. The whole of the argument for the defendant was based on the words of the note, and it seems to me that it impliedly admitted that if the words, instead of being "I have sold on your account," had been, "I have bought," then, unless there was something on the face of the document distinctly shewing that the defendant was not contracting as a principal, the effect of the signature to the note in his name would be to render him personally liable. I am free to admit that if this had not been a mercantile document, and we were construing a new form of contract in the same words, there might have been a real distinction between the words "I have sold for you" and the words "I have bought of you;" but the question is, what the meaning of a document such as this is, viewed as a mercantile document, when signed by a person who, I will assume, was known to be a broker, comparing it with other similar documents that

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have received a construction by the Courts, and are well known among mercantile men. *Humfrey* v. *Dale* (1) seems to me to be as good as an express decision on the meaning of this document. Lord Campbell and Crowder, J., say distinctly that such a document amounts to a contract of purchase.

Therefore, if we were to rule that the document here was not a contract of purchase, we should be virtually overruling that case. It is impossible to suppose that if there had been anything in this distinction, no argument based upon it would have been suggested in that case. Then, if this document amounts to a contract of purchase, the cases of *Paice* v. *Walker* (2) and *Pennell* v. *Alexander* (3) are distinctly in point. The former is an a fortiori case. The words there were stronger than here to shew that the defendant intended to contract as an agent, and not as a principal. It is true the principal there was a foreign principal, but the Court distinctly declined to base their judgment on this fact. It appears to me, therefore, that the expressions used in this contract, though they shew that the defendant was acting as an agent, must be taken as shewing no intention that the defendant should be exempted from the liability that would ordinarily be thrown upon him by law when acting for an undisclosed principal. It seems that words added by way of qualification to the signature are entitled to more weight than the same expressions occurring in the body of the instrument. In *Humfrey* v. *Dale* (1) the term "broker" was added to the signature. It cannot be contended that the fact that it appears in the body of the document that the defendant is not purchasing for himself exempts him from personal liability. In *Paice* v. *Walker* (2) it appeared that the defendant was acting as agent, but it was held that, inasmuch as no qualifying expression was added to the signature, there must, in order to exempt the defendant from personal liability, be something in the document not only shewing that the defendant was acting as an agent, but shewing that he intended to exempt himself from the liability that the contract so signed would otherwise throw upon him as principal. In many of the cases the defendant professed to act for some other person not

(1) E. B. & E. 1004; 27 L. J. (Q.B.) 390. (2) Law Rep. 5 Ex. 173.
(3) 3 E. & B. 283; 23 L. J. (Q.B.) 171.

18 Jur 627.

W S C 3 Jur N S. 213. 5 Ch 191

named; the mere fact that it appears on the contract that the defendant acted for another cannot exempt him from personal liability consistently with *Paice* v. *Walker* (1) and many other cases. That being so, the whole of the argument for the defendant turns on the suggested construction of the document; but, as before stated, the decisions are strong to shew that the bought and sold notes are not to be distinguished from each other, and the liability depends, in the case of a mercantile instrument like this, not so much on the exact meaning of the particular words used as on the nature and substance of the transaction, looked at according to the understanding of mercantile men.

DENMAN, J. The contention now set up in support of the rule is, that the sold note, though signed by the defendant in his own name without any qualification to such signature, does not make him personally liable for goods sold and delivered, because it shews on the face of it that it is not a contract for the sale and delivery of goods at all. The law is clearly laid down in the cases cited in the note to *Thompson* v. *Davenport* (2), that, as a general rule, where a man signs without qualification in his own name he is primâ facie liable, and in order to exempt himself he must make it appear clearly on the face of the contract that he did not intend to be liable as a principal. There is nothing, as it seems to me, of such a nature appearing on the face of this contract, and therefore if the document amounts to a contract of purchase the defendant is a principal. But Mr. Cohen said, that the document was not a contract of purchase, and therefore, even if the defendant was bound by the document as principal to something, he was not bound as a purchaser. I will not add anything on this point to what has been said by the rest of the Court. The words have practically received judicial construction by the Court of Queen's Bench and Exchequer Chamber, and we cannot, in my opinion, upset what has so long been treated as the true construction of a well-known mercantile document. Another observation that occurs to me is this, we ought in considering whether the document is a contract of sale or not to look at the whole of the language used, and not some expressions only. It seems to me

(1) Law Rep. 5 Ex. 173. (2) 2 Sm. L. C. 7th Ed. 364.

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that when the defendant signed a document framed as this is, setting out at full length every particular of the contract entered into, as this does, and in all respects like a contract, he could not have considered that he was signing not a contract but only a mere note, or piece of useful information to the plaintiffs.

For these reasons, I agree with the rest of the Court that this rule should be discharged.

Rule discharged.

Solicitors for plaintiffs: *Venning, Robins, & Venning.*
Solicitor for defendant: *Anthony Carr.*

1875
Nov. 25.

SCALTOCK *v.* HARSTON.

*Landlord and Tenant—Ejectment for a Forfeiture—Assignee of Reversion—Non-repair—Notice of the Assignment—*32 *Hen.* 8, *c.* 34.

The assignee of the reversion of a lease may maintain ejectment for breach of a covenant to repair, without giving the tenant notice of the assignment.

EJECTMENT to recover the possession of houses in Southampton Street, Camberwell, held under two leases, dated respectively the 25th of September, 1822, and the 25th of March, 1851, containing the usual covenant to repair, with a power to the lessor, his heirs and assigns, to re-enter in case of breach by the lessee or his assigns. The plaintiff sued as assignee of the reversion, in respect of a breach of the covenant to repair.

The cause was tried before Pigott, B., at the sittings in Middlesex after Michaelmas Term, 1874. It was proved that the plaintiff had become possessed of the reversion, and that a breach of the covenant to repair had been committed after the assignment to him. The defence set up was, that the defendant had had no notice of the assignment to the plaintiff, the rent having always been paid to his predecessor in title, Thomas Flight.

A verdict was entered for the plaintiff, with leave to the defendant to move to set it aside, and enter it for him, if the Court should be of opinion that the action could not be maintained in the absence of notice to the tenant that the plaintiff had become assignee of the reversion.

G. R. Kennedy, in Hilary Term, 1875, obtained a rule nisi.

Nov. 24. *Wilberforce* shewed cause. No notice of the assignment was necessary to enable the plaintiff to maintain this action. By 32 Hen. 8, c. 34, the assignee of the reversion is placed in the same position with regard to the covenants of the lease as the original lessor: *Fraunces's Case.* (1) The opinion there cited of Popham, J., and *Mallory's Case* (2), which will be cited for the defendant, had reference to the breach of a covenant for payment of rent, which differs in the nature of things from a covenant to repair. Until he has notice of an assignment, the lessee cannot know that he has to pay rent to the assignee. But he is bound to perform his covenant to repair, whoever may be owner of the reversion; and therefore an action for breach of the covenant to repair will lie at the suit of the assignee of the reversion, without notice of the assignment: *Hingen* v. *Payn.* (3) The opinions of Coke, C.J., and Foster, J., in *Bristow and Bristowe's Case* (4), support this view.

Kennedy, in support of the rule, contended that notice of the assignment was necessary before the assignee could maintain ejectment for breach of any of the covenants in the lease. He cited Comyns's Digest, Condition (O. 2); Co. Litt. 215. a., 215. b.; *Pope* v. *Biggs* (5); *Gibson* v. *Doeg* (6); *Doe* d. *Palk* v. *Marchetti.* (7)

Cur. adv. vult.

Nov. 25. GROVE, J. In this case, which was argued yesterday before my Brothers Archibald and Lindley and myself, we took time to look into the authorities. It was an action of ejectment by the assignee of the reversion against a sub-lessee founded upon a right of re-entry for the breach of a covenant to repair; the lease containing a covenant by the lessee and his assigns to repair and sustain the demised premises, and a proviso for re-entry for a breach of any of the covenants in the lease. It was assumed at the trial before my Brother Pigott at the sittings in Middlesex after Michaelmas Term, 1874, that the premises were out of repair,

(1) 8 Co. Rep. 92. a.
(2) 5 Co. Rep. 113.
(3) Cro. Jac. 475.
(4) Godb. 161.
(5) 9 B. & C. 245.
(6) 2 H. & N. 615; 27 L. J. (Ex.) 37.
(7) 1 B. & Ad. 720.

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and therefore that the defendant had been guilty of a breach of the covenant. The only point argued before us in support of the motion for a new trial was, that the sub-lessee had received no notice that the plaintiff had become assignee of the reversion before the issuing of the writ: and it was insisted that the action was not maintainable in the absence of such notice.

There is no express decision upon the subject: but two cases were relied on for the defendant, viz. *Mallory's Case* (1) and *Fraunces's Case* (2), where it was held that in order to take advantage of a forfeiture for non-payment of rent, notice of assignment is necessary. Prior to 32 Hen. 8, c. 34, which enabled the grantees or assignees to have the like advantage as the lessors or grantors themselves might have had, the tenant could not become tenant of the assignee without attornment; and *Mallory's Case* (1) is an authority that to be an assignee within the meaning of that statute, the assignee ought to have all that was requisite at common law, viz. attornment. But, after that statute, an assignee of the reversion, with attornment by the tenant, had the same rights as the grantor himself had before that statute. By the statute 4 Anne, c. 16, s. 9, the necessity for attornment is taken away, with this proviso in s. 10, that "no such tenant shall be prejudiced or damnified by payment of any rent to any such grantor or conusor by breach of any condition for non-payment of rent, before notice shall be given to him of such grant by the conusee or grantee." But that proviso is expressly limited to the case of an entry for breach of a condition by non-payment of rent; and in that case it protects the tenant where in ignorance or mistake he has paid his rent to the grantor before he has had notice of the assignment. The reason for this is obvious. The tenant, unless he has notice of the assignment, does not know to whom he is to tender the rent; and it would be monstrous that his lease should be forfeited when he has no means of knowing to whom the reversion has been assigned. But that, as I said before, is expressly limited to non-payment of rent. There is no case where it has been held necessary to give notice in the case of a forfeiture for breach of the covenant to repair. Nor is it easy to see what benefit such a notice would be to the tenant, unless the notice was

(1) 5 Co. Rep. 113. b. (2) 8 Co. Rep. 93. a.

long enough to give him time to put the premises in repair. That is not contended for here. Indeed, it would be altogether changing the effect of the covenant. As far as I can form an opinion, it has never been held that notice of assignment is necessary before advantage can be taken by the assignee of the breach of a covenant to repair. It may be that this rule will inflict some hardship on the tenant, as where the want of repair is but trifling: on the other hand, the tenant may have grossly neglected the premises, and then the hardship would be the other way. Besides, if there be any hardship, the legislature may remedy it, as in the case of a breach of the covenant to insure. Our duty is simply to administer the law as we find it. The reasoning in *Mallory's Case* (1) and *Fraunces's Case* (2), when explained, is clear. There is no case nor any decision which applies that doctrine to the case of a forfeiture for breach of the covenant to repair. I think the verdict was properly entered for the plaintiff in this case, and that this rule should be discharged.

ARCHIBALD, J. This is an action of ejectment brought by the assignee of the reversion of a lease against the tenant, to recover possession of the premises on the ground of a forfeiture by reason of a breach of a covenant to repair contained in the lease. At the trial a verdict was entered for the plaintiff: and a new trial is asked for on the ground that the forfeiture was not complete without notice to the tenant of the assignment of the reversion to the plaintiff. The rights of the parties become obvious when the course of legislation on the subject is followed. At the common law, for feudal reasons, there might have been an assignment of the reversion; but such an assignment would not have made the tenant, unless he consented to become so, tenant of the assignee. He could not be made a vassal without his consent. The assignee of the reversion at common law had a right to distrain for rent, because the rent was incident to the reversion: but he had no right to avail himself of a condition of re-entry. Such being the state of things at common law, and inconvenience being found to result from it, on the dissolution of monasteries the stat. 32 Hen. 8, c. 34, was passed, giving to the assignee of the reversion the same

(1) 5 Co. Rep. 113. b. (2) 8 Co. Rep. 93. a.

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rights as the lessor or grantor himself had before. That still left open the question what was essential to constitute an assignee of the reversion; and it was found to be still necessary, notwithstanding that statute, that there should be an attornment by the tenant, except in those cases in which there was a conveyance by bargain and sale under the Statute of Uses. That was the state of things which existed between the passing of the stat. 32 Hen. 8, c. 34, and that of the 4 Anne, c. 16. This last-mentioned statute (ss. 9, 10) did away with the necessity of attornment, but took care at the same time to protect a lessee who had paid rent to the lessor without having had notice of the assignment of the reversion. Its operation was to complete the title of the assignee, and to protect the tenant against the breach of a condition for payment of rent. In the case of non-repair, it is not necessary to give notice of the assignment of the reversion, to entitle the assignee to re-enter for breach of the covenant.

LINDLEY, J. I am of the same opinion. The defendant contends that the assignee of the reversion cannot enter for breach of the covenant to repair, without notice of the assignment to the tenant. Why should notice be necessary? The answer is not obvious. It is quite immaterial to the tenant who is his landlord: he is bound at all events to keep the premises in repair. Then, how does it stand upon authority? The authority which is most favorable to the defendant's contention is the passage from Coke cited in Com. Dig. Condition (O. 2.). But, when looked at, *Mallory's Case* (1) does not warrant that proposition. Before the Statute of Uses and 32 Hen. 8, c. 34, there were difficulties in the way of grantees of the reversion taking advantage of a condition broken. These difficulties were removed by those statutes, subject to an exception which was ultimately done away with by 4 Anne, c. 16; and it is now no longer necessary to give notice of the assignment except in the case of a forfeiture for non-payment of rent.

Rule discharged.

Solicitors for plaintiff: *Lewis & Sons.*
Solicitors for defendant: *Webb, Stock, & Burt.*

(1) 5 Co. Rep. 113. b.

EDWARDS AND ANOTHER *v.* HANCHER. 1875 *Nov.* 12.

*Bankrupt—Resolution for a Composition by Promissory Notes with a Surety—Default in Payment—*32 & 33 *Vict. c.* 71, *ss.* 125, 126.

Defendant having filed a petition for liquidation under s. 126 of the Bankruptcy Act, 1869, at a meeting duly convened (the plaintiffs being assenting creditors), resolutions were passed, that a composition of 3*s.* in the pound should be accepted by the creditors in satisfaction of their debts, that such composition should be payable by instalments at three, six, and twelve months, and that the security of S. should be accepted for the whole of the composition; and a trustee was appointed.

Joint and several promissory notes of defendant and S. for the composition, payable at the National Provincial Bank of England at Birmingham, were given to plaintiffs and the other creditors, and receipts signed by them, expressing it to be "in discharge of their debts."

The first note was presented at the bank at maturity, and dishonored, but no demand was made upon S. or the trustee:—

Held, that the plaintiffs were remitted to their right to sue for their original debt,—the mere giving of the notes, without payment, not being satisfaction within the terms of the resolution or the receipt.

1 C.P.D. 270
2 C.P.D. 486

To a declaration for goods sold, &c., the defendant pleaded,

1. That he never was indebted, as alleged.

2. That, before action, he satisfied and discharged the plaintiffs' claim by delivering to the plaintiffs three promissory notes whereby the defendant and Henry Smith jointly and severally promised to pay to the plaintiffs or their order three several sums of money in full satisfaction and discharge of the plaintiffs' claim, which notes the plaintiffs accepted from the defendant in full satisfaction and discharge as aforesaid.

3. That, after the accruing of the plaintiffs' claim, and before action, the defendant, being a debtor unable to pay his debts, petitioned the Court of Bankruptcy for the liquidation of his affairs by arrangement or composition, and such proceedings were thereupon duly had that the creditors of the defendant, by an extraordinary resolution, resolved that a composition of 3*s.* in the pound should be accepted in satisfaction of the debts due to the creditors from the defendant, and that such composition should be payable as follows, by three instalments of 1*s.* each,—the first in three, the second in six, and the third in twelve months from the

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date of the confirmation of the said resolution, and that the security of Henry Smith should be accepted for the whole of the said composition and the receiver's and solicitors' costs, to be given in the joint and several promissory notes of the defendant and the said Henry Smith; and a statement shewing the whole of the assets and debts of the defendant, and the names and addresses of the creditors to whom such debts were due, including the names and addresses of the plaintiffs and the amount of the debt due to them and claimed in and by the declaration, was produced at the meetings at which the resolution passed; and the said resolution and statement were presented to the registrar and duly registered; and the said composition was duly paid and secured to the plaintiffs pursuant to the said resolution; and all conditions had been fulfilled necessary to entitle the defendant to be discharged from the said debt by the resolution and the performance thereof. Issue thereon.

At the trial before Brett, J., at the sittings at Westminster in Hilary Term last, the debt was admitted, and the defendant, in support of his second and third pleas put in the following resolutions (to which the plaintiffs were assenting parties) agreed to at a meeting of his creditors under the liquidation on the 14th of July, 1874:—

"1. That a composition of 3*s.* in the pound shall be accepted in satisfaction of the debts due to the creditors from the said John Hancher.

"2. That such composition be payable as follows,—by three instalments of 1*s.* each, the first instalment in three months, the second in six months, and the third in twelve months from the date of the confirmation of this resolution.

"3. That the security of Henry Smith, of Muntz Street, Birmingham, glass cutter, be accepted for the whole of the composition and for the receiver's and solicitors' costs.

"4. That L. J. Sharp, of Birmingham, be appointed trustee."

It was further proved that on the 24th of July, 1874, three joint and several promissory notes for 4*l.* 10*s.* 10*d.* each were made by the bankrupt and Smith, and delivered to the plaintiffs, who thereupon gave a receipt in the following form:—

"The Bankruptcy Act, 1869.

"In the County Court of Warwickshire holden at Birmingham.

"In the matter of John Hancher.

"Received of Mr. Luke J. Sharp, trustee of this estate, three promissory notes dated the 24th day of July, 1874, and payable at three, six, and twelve months respectively, amounting in the aggregate to the sum of 13*l.* 2*s.* 6*d.*, being a composition of 3*s.* in the pound on our debt of 90*l.* 17*s.* 11*d.*, resolved to be accepted at a general meeting of creditors held on the 14th day of July, 1874, and in discharge of our debt.—Edwards, Brothers."

These notes were made payable at the National Provincial Bank of England at Birmingham, where the defendant kept no account. On the 29th of October the first note became due, and was presented at the bank, but not paid. Without making any application to the surety, the plaintiffs on the 30th issued the writ in this action, claiming the original debt.

On the part of the defendant it was contended that the acceptance by the plaintiffs of the promissory notes with a surety pursuant to the resolution, and giving the receipt, operated as satisfaction of the original debt, and that the plaintiffs were bound to call upon Smith the surety, or might have compelled the trustee to enforce payment of the instalments.

The learned judge directed a verdict to be entered for the plaintiffs, giving the defendant leave to move.

Jan. 19, 1875. *A. L. Smith* obtained a rule accordingly, on the grounds that the plaintiffs accepted the joint and several promissory notes of the defendant and Smith in satisfaction and discharge of his claim, and that the plaintiffs should have applied to the trustee or to Smith for payment of the notes before bringing the action.

Nov. 12. *Plowden* shewed cause. The first question is, what is the effect of the resolutions of the 14th of July, 1874? If these do not operate as satisfaction, the plaintiffs are clearly not estopped from suing for their original debt. *Edwards* v. *Coombe* (1), confirmed by *Newell* v. *Van Praagh* (2), is a distinct

(1) Law Rep. 7 C. P. 519. (2) Law Rep. 9 C. P. 96.

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authority to shew that they are not so estopped The only difference in reality between those cases and the present is, that here there was a surety, there not; for, the circumstance of the plaintiff being an assenting or a non-assenting creditor is perfectly immaterial. It is the *payment* of the composition alone that can be a satisfaction. This view was adopted by the Lords Justices in *Re Hatton.* (1) In *Newell* v. *Van Praagh* (2) Brett, J., says: "It seems to me that the decision in *Edwards* v. *Coombe* (3) turned upon the construction of the Bankruptcy Act, and not on the common-law doctrine of the suspension of a remedy; that the meaning of the statute was that the creditor should not be entitled to go on with an action until the composition was due, and that, *if paid* when due, it should extinguish the debt; but that, if it were not paid, it should be just as if there had been no composition, and the creditor should be entitled to the usual remedies, and be generally in the same position as if the resolution for the composition had never passed." The form of receipt clearly makes no difference. By making the promissory notes payable at the National Provincial Bank at Birmingham, the makers undertook to have funds there to meet them at maturity: *Saunderson* v. *Judge.* (4) Rules 275, 279, and 281 of the General Rules of 1870 were also referred to.

A. L. Smith and *Arbuthnot*, in support of the rule. Taking the resolutions and the receipt together, the acceptance of the promissory notes with a surety barred the plaintiffs' claim in respect of the original debt. In Byles on Bills, 10th ed. p. 233, it is said: "The acceptance of a *negotiable* security from the debtor alone may be a satisfaction even of a debt of larger amount. Where a bill or note on which some person other than the debtor is liable is expressly given and accepted in full satisfaction and discharge, the liability of the debtor for the original debt will not revive on the dishonor of the substituted instrument." For this the learned author cites *Sibree* v. *Tripp* (5), *Hardman* v. *Bellhouse* (6), and *Sard* v. *Rhodes.* (7) The effect of the resolutions is,—"If you (the

(1) Law Rep. 7 Ch. 723.
(2) Law Rep. 9 C. P. at p. 104.
(3) Law Rep. 7 C. P. 519.
(4) 2 H. Bl. 510.
(5) 15 M. & W. 23.
(6) 9 M. & W. 596.
(7) 1 M. & W. 153.

debtor) will get us the security of a solvent man who can pay us a composition of 3*s.* in the pound, we (the creditors) will discharge or release you from our respective debts."

[LORD COLERIDGE, C.J. A solvent man who *does* pay.]

Rather, it is submitted, a solvent man who is liable and who may be effectually sued. In *Re Hatton* (1), Mellish, L.J., says: "At common law, where a body of creditors accept a composition, they may either agree to take the promises of the debtor with or without a surety in satisfaction of the debts, or they may agree that payment shall be a condition precedent, and that, if the debtor pays the composition at a certain time and place, the creditors will accept that composition in satisfaction of their debts. It is a question of construction of the instrument of arrangement, and it is not uncommon for the creditors to accept a promise by the debtor and a surety as a satisfaction of their debts."

[GROVE, J. Does not "composition" necessarily involve payment?]

The creditors cannot have a right against the surety for 3*s.* in the pound, and at the same time a right against the principal for 20*s.*

LORD COLERIDGE, C.J. This was a rule to set aside a verdict for the plaintiffs for a debt admitted to be due from the defendant to the plaintiffs, and to enter a verdict for the defendant on the ground that the debt was satisfied and discharged by a composition under a resolution passed by the creditors of the defendant at a meeting held under a proceeding for liquidation under s. 126 of the Bankruptcy Act, 1869. The question turns upon the construction of that resolution and of a receipt given by the creditors in pursuance thereof. The facts are few and simple. The defendant was indebted to the plaintiffs and to various other persons. Being unable to pay his debts in full, he filed a petition for liquidation in bankruptcy, and at a meeting of his creditors resolutions were passed that a composition of 3*s.* in the pound should be accepted by them in satisfaction of their debts, payable by three instalments at three, six, and twelve months, and that the security of one Smith should be given for the whole composition. Accord-

(1) Law Rep. 7 Ch. at p. 726.

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ingly, the joint and several promissory notes of the debtor and the surety were given to the plaintiffs for the three instalments of the composition, and made payable at the National Provincial Bank of England at Birmingham; and a receipt was given in these terms:—"Received of Mr. L. J. Sharp, trustee, &c., three promissory notes dated the 24th of July, 1874, and payable at three, six, and twelve months respectively, amounting in the aggregate to 13*l.* 2*s.* 6*d.*, being a composition of 3*s.* in the pound on our debt of 90*l.* 17*s.* 11*d.*, resolved to be accepted at a general meeting of creditors held on the 14th of July, 1874, *and in discharge of our debt.*" At the expiration of the three months, the first instalment became due, and the first note was presented at the bank where it was made payable, but there were no funds there to meet it. Application for payment was then made to the debtor; the note was not met, and a writ was immediately issued for the recovery of the entire debt. The question is, whether the plaintiffs are entitled to maintain their action, their right to which was suspended whilst the conditions bound them. The fact of the plaintiffs being assenting creditors cannot, I conceive, make any difference: every creditor, whether assenting or non-assenting, is equally bound if the resolution for the composition is properly carried. In *Edwards* v. *Coombe* (1), in this Court, it was held that it is competent to a non-assenting creditor, notwithstanding a resolution for a composition under s. 126 of the Bankruptcy Act, 1869, to sue for his original debt, where the debtor has failed to pay or tender the composition within the time agreed on, or within a reasonable time; and that the creditor is not restricted to the summary remedy, by application to the Court of Bankruptcy, provided by that section. *Newell* v. *Van Praagh* (2), which followed that case, is a strong authority to the same effect. There, the Court held that the failure of the debtor to meet the first instalment of a composition under such a resolution had the effect of remitting the creditor to the position he occupied before the proceedings in bankruptcy took place. It is too clear for dispute now that it is the payment of the composition, and not the mere resolution to accept a composition, which by the terms of the Act is made the consideration for the suspension of the creditor's remedy. This is

(1) Law Rep. 7 C. P. 519. (2) Law Rep. 9 C. P. 96.

clearly pointed out by Willes, J., in *Edwards* v. *Coombe* (1), who founds himself mainly on the last clause of s. 126, which abundantly warrants his conclusion. It is plain, therefore, that, if this had been the agreement of the debtor himself, and he himself had made default in payment of the first instalment, the creditors would have been remitted to their right to sue for their original debt. But it is said that the case is different where the security of a solvent man is taken for the payment of the composition. No doubt, it is the promise of the defaulting debtor and the promise of the surety which form the consideration for the resolution of the creditors to accept the composition. But the rule of law and the construction of the document must be the same whatever the consideration for the resolution. The terms of the resolution must be complied with. As a general rule, if a creditor takes from his debtor a bill or note of an apparently solvent third person, and the bill or note is not paid at maturity, the original debt revives. It may be that creditors may choose to take the security of a solvent person for the composition in discharge of their respective debts. But, after all, it comes to a question as to the construction of the words of the resolution. Upon the present resolutions alone, I think it is plain that it was the payment of the composition, and not the mere giving of the notes with a surety, that was intended to be accepted by the creditors in satisfaction and discharge of their respective claims. The first part of the resolutions is, that a composition of 3*s.* in the pound shall be accepted in satisfaction of the debts; the second is, that the composition be payable at three, six, and twelve months; and the third is, that the security of Smith shall be accepted for the whole of the composition. If the composition is not *paid*, it is as if no security had been given. Then, it is said that the language of the resolutions is to be interpreted by that of the receipt which was given for the notes. Seeing that the English language is not a very precise one, and that this is by no means a favorable specimen of it, I do not deny that it is possible to read the receipt in the sense in which the learned counsel for the defendant seek to read it. But, the resolution being clear that the composition is to be the thing that is to be accepted in satisfaction of the debts, it seems to me to be a very

(1) Law Rep. 7 C. P. 519.

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strong proposition to say that its construction is to be affected by the doubtful language of the receipt. Fairly construed, the receipt amounts to this,—the 13*l.* 2*s.* 6*d.*, the whole amount of the composition of 3*s.* in the pound, is the thing which the creditors resolve shall be accepted, and which when paid will be accepted in satisfaction of the original debts. That is the conclusion at which I arrive without any doubt, and therefore, in my judgment, the plaintiffs are by the failure of payment of the first instalment remitted to their original rights. I am consequently of opinion that this rule should be discharged.

GROVE, J. If the matter had stood upon the receipt alone, I am not sure that I should not have acceded to the argument of the defendant's counsel. But, reading the receipt with the resolutions, it seems to me that the true meaning is that it is not the promissory notes for the composition that are to be accepted in satisfaction of the original debts, but that it is the composition itself that is to be so accepted, that is, paid, before the debtor is released from his debts. A composition of 3*s.* in the pound is to be accepted in satisfaction,—that composition is to be payable by certain instalments,—and the security of Smith is to be accepted for the whole of the composition. The security is to be something in addition to and not in substitution for the composition agreed to be taken. Composition, as Willes, J., observes in *Edwards* v. *Coombe* (1), necessarily involves the fact of payment. It would in my opinion require strong language to lead to any other conclusion. No doubt creditors may, as Mellish, L.J., says in *Re Hatton* (2), agree "to accept a promise by the debtor and a surety as a satisfaction of their debts." But the question here is, whether the creditors have done so. Doubtless there is some ambiguity in the language of the receipt: but, when the resolutions are looked at, that ambiguity is explained. After all, it is a question of construction.

ARCHIBALD, J. The defence set up is, that it is the acceptance of the agreement to pay the composition and the addition of the responsibility of a surety which is to operate as a satisfaction of

(1) Law Rep. 7 C. P. at p. 522. (2) Law Rep. 7 Ch. at p. 726.

the debts. The question is whether there is any evidence of that to be drawn from the terms of the resolutions or of the receipt given by the plaintiffs when the promissory notes were handed to them. There can be little or no dispute as to the legal principle which is applicable to the present case. If a bill or note is given by a debtor to his creditor for a smaller sum than is due, the bill or note so given cannot of itself operate as a satisfaction of such larger claim; though it may, if given by a third person. But, even in that case, there must be something to shew that it was agreed to be accepted in full satisfaction. Now, what takes place here is this:—The creditors have agreed, by a resolution under the Bankruptcy Act, to accept a composition of 3*s.* in the pound in satisfaction of their debts. The only difference between such a resolution and a composition by agreement for a good consideration is, that the former binds non-assenting creditors. To make it operate as more than a suspension of the remedy, there must be performance of the condition, viz. due payment of the composition. That is settled by *Edwards* v. *Coombe* (1) and *Newell* v. *Van Praagh.* (2) The only question here is, what is the fair construction of the resolutions and the receipt? Is it the agreement for a composition that is to be accepted in satisfaction, or is it the payment of the instalments? There is nothing in the resolutions to shew that the creditors agreed to take anything except the money. Composition here is synonymous with payment of the 3*s.* in the pound. Then, is that varied by the receipt? I think not. It is a mere acknowledgment of the receipt of the notes upon the terms of the resolution. The latter words may be a little ambiguous: but, fairly looked at, the real meaning is such as I have stated, and no more. The debtor having failed to perform the condition upon which his original liability was to be discharged, the legal consequence follows, that the debt remains.

Rule discharged. (3)

Solicitor for plaintiffs: *R. A. Dale.*

Solicitors for defendant: *Robinson & Preston, for J. & W. Eastham, Clitheroe.*

(1) Law Rep. 7 C. P. 519.

(2) Law Rep. 9 C. P. 96.

(3) See *Ex parte Mirabita, Re Daly,* Law Rep. 20 Eq. 772.

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Dec. 21.
1876
Feb. 16.

[IN THE COURT OF APPEAL.]

HUGHES *v.* THE METROPOLITAN RAILWAY COMPANY.

Lease—Forfeiture for Non-repair—Relief in Equity—Notice to repair, Suspension of—Negotiation for Purchase of Premises—Tenant misled by Landlord's Conduct.

Equity will relieve a lessee against forfeiture for breach of a covenant to repair when the landlord has by his conduct misled the lessee into supposing that the covenant would not be insisted on.

A lease of certain premises contained a covenant to repair upon six months' notice and a condition of re-entry for breach. The defendants became sub-lessees of the premises under a lease containing a similar covenant. The premises being out of repair, the plaintiff, who was the reversioner, gave notice to the defendants on the 22nd of October, 1874, to repair within six months. The defendants wrote to the plaintiff suggesting that he should purchase their interest, and stating that they should postpone the repairs until they heard from him on the subject. Negotiations thereupon took place with reference to a purchase of the defendants' interest by the plaintiff, and finally the plaintiff wrote on the 31st of December to the defendants, stating that the price they asked was out of all reason, having regard to the expenditure which would be required to put the premises into proper condition, and which the defendants would have to bear under their covenants, and requesting the defendants to reconsider the question of price, and to make some modified proposal. No further proposal was made by the defendants, and though some further correspondence took place with regard to the premises, the plaintiff never intimated to the defendants that he considered the negotiations at an end. On the 13th of April, 1875, the plaintiff wrote to the defendants' lessor stating that the six months' notice would expire on the 21st. The defendants thereupon caused the premises to be repaired, and the repairs were completed in June, 1875. The plaintiff brought an action of ejectment in respect of the premises, and recovered judgment therein, and the defendants sought relief against the forfeiture.

The Common Pleas Division held that the negotiations were finally broken off on the 31st of December, no further proposal having been made by the defendants; that the effect of the correspondence was only to give the defendants a reasonable time for repairing after that period; and that, inasmuch as the interval between the 31st of December and the 21st of April was a reasonable time for that purpose, the defendants were not entitled to relief:—

Held, by the Court of Appeal (reversing the decision of the Common Pleas), that the true construction of what had taken place was that the notice to repair was suspended during the negotiations, that the negotiations were not finally broken off on the 31st of December, and that the plaintiff by his conduct had misled the defendants into supposing that the notice to repair was still suspended, and that he was not insisting on the breach of the covenant, and, consequently, that it would be inequitable to permit him to take advantage of the forfeiture.

Affirmed 4 H & L 1 Cas 439

THE Metropolitan Railway Company were possessed as sub-lessees of (amongst others) a house numbered 216 in Euston Road,

which was in 1787 leased by the then Lord Southampton to James Haygarth for ninety-nine years. This lease ultimately became vested in Colonel Penley, who underleased to the railway company. The reversion expectant on the determination of the term had been acquired by the plaintiff in October, 1874.

The lease of 1787 contained covenants on the part of the lessee, his heirs, executors, administrators, and assigns, to repair as often as need should require; and also a provision enabling the lessor, his executors, &c., to enter and view the premises, and "to give or leave notice in writing on the demised premises for the amendment of all defects and wants of reparation then and there found:" and the lessee further covenanted that he would "within six months next after every such notice well and sufficiently repair, amend, and make good all such defects or wants of reparation and amendment and all other defects and wants of reparation whatsoever in the demised premises." The lease also contained a clause in the usual form, enabling the lessor, his heirs, &c., to re-enter for a breach by the lessee of any of his covenants. The underlease to the Metropolitan Railway Company contained similar covenants.

On the 22nd of October, 1874, the plaintiff caused to be left on the premises a notice in the following form:—

To James Haygarth, his executors, administrators, and assigns, and whomsoever it may concern.

Take notice that you are hereby required to do and perform the several works of repair as set forth in this schedule, in a proper and workmanlike manner, within the space of six calender months from the date hereof, to comply with the covenants of the lease under which the said premises are held of the freeholder. Dated this 22nd day of October, 1874. (Signed) Thomas Hughes.

At the foot of this notice was a schedule containing particulars of the defects required to be amended. The notice came to the knowledge of the railway company shortly after its date; but Colonel Penley did not in fact become aware of it until the 14th of April, 1875, which was only a few days before the expiration of the six months mentioned therein.

On the 28th of November, 1874, the company's solicitors wrote to the solicitors of the reversioner, as follows:—

We are directed by the company to say that the notices of repair served upon the premises (describing them) have been received, and that the repairs required by the covenant of the lease shall be forthwith commenced. It occurs to us that

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the reversioner may be desirous of obtaining possession of the company's interest, which, as you know, is but short; and so we propose to defer commencing the repairs until we hear from you as to the probability of an arrangement such as we suggest.

To this letter the solicitors of the reversioner replied on the 1st of December, 1874, as follows:—

We duly received your letter of the 28th ult. suggesting that our client, the freeholder, should purchase the company's short leasehold interest in these houses, and have since seen our client thereon. If the company are the owners of 222, Euston Road and the rear thereof, and the whole of the premises in the rear of the other houses in Euston Road mentioned in your letter, and are willing to sell them all and give immediate possession, my client will, on hearing from you the price, consider whether it is worth his while to acquire the company's interest or not. In mentioning the price, please to give us particulars of the tenancies and rents paid to the company.

On the 30th of December, 1874, the company's solicitors addressed the solicitors of the reversioner as follows:—

We send you herewith a statement of the company's receipts and payments in respect of the houses in Euston Road, as requested by you. The company will agree to surrender the whole of the leases, in consideration of a payment of 3000*l*. We shall be glad to hear from you at your early convenience. (Particulars were annexed).

To this the following reply was sent on the 31st:—

We have duly received your letter of yesterday's date, inclosing a statement of the company's receipts and payments in respect of the houses in Euston Road, and at the same time intimating that the company will agree to surrender the whole of the leases in consideration of the payment of 3000*l*. Having regard, however, to the state of repair in which the houses now are, and to the large expenditure which will be required to put them in a proper condition, the whole of which the company are liable to bear under the covenants in the leases, we think the price asked for is out of all reason. We must, therefore, request you to re-consider the question of price, having regard to our previous observations and to the fact that the company have already been served with notices to put the premises in repair; and we shall be glad to receive in due course a modified proposal from you.

On the 17th of January, 1875, the reversioner's solicitors wrote to the secretary of the railway company, as follows:—

212, 214, 218, 222, 224, 226, and 228, Euston Road. Mr. Hughes, of 194, Euston Road, has requested us to collect the ground-rents in respect of these houses. There was a half-year due at Michaelmas last, amounting to 23*l*. 2*s*., for which sum we shall be glad to receive a cheque.

216, Euston Road. Can you tell us the address of Colonel Penley, to whom you pay a sum of 100*l*. a year in respect of this house?

On the 7th of January, 1875, the secretary replied, as follows:—

In reply to your favour of the 6th instant, I will obtain a cheque for the

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ground-rents due to your client, Mr. Hughes, at our finance committee meeting in next week.

216, Euston Road. The rent payable to Colonel Penley by the company is remitted to Messrs. Remnant & Penley, of 52, Lincoln's Inn Fields.

On the 13th of April, 1875, the reversioner's solicitors wrote to Messrs. Remnant & Penley, as follows:—

216, Euston Road. We send herewith a letter from Mr. Birt, the solicitor of Lord Southampton, authorizing your client, the owner of this house, to pay the ground-rent of 10s. a year to our client Mr. Thomas Hughes.

We beg to inform you that in October last Mr. Hughes caused particulars of dilapidations in respect of this house to be served upon the tenants, and that the time for completing the repairs in accordance with such notice will expire on the 21st instant.

On the following day Messrs. Remnant & Penley replied, as follows:—

216, Euston Road. Your letter of yesterday's date is the first intimation we have had as to who is the owner of this property. When we called last to pay the rent, we were informed Lord Southampton had parted with his interest, but we could not learn to whom. We have had no notice at all of any want of repair; nor did we know until your letter that any particulars had been served upon the tenants.

The Metropolitan Railway Company are the undertenants; and we have forwarded a copy of your letter to them at once, so that it may be attended to without delay. Why was not a copy of the notice served upon us? We inclose ground-rent, one year, 10s., for which please send us a receipt.

On the 14th of April the reversioner's solicitors wrote to Messrs. Remnant & Penley, acknowledging the receipt of the 10s., and adding,—

You will be good enough to consider the rent as received without prejudice to the notice to repair and all our client's rights under the original lease. At the time the notice of repair was served upon the tenant, we did not know that your client was the owner of the lease, or we should have served you with a copy of the notice on his behalf.

On the 18th of April, 1875, Messrs. Remnant & Penley again wrote to the reversioner's solicitors, as follows:—

Had we known that the notice to repair had been served, we of course should at once have seen to it; and we think inquiries should have been made earlier, to enable you to communicate with us. We do not know what the notice is, or what we are required to do. Have you a copy?

We have communicated with the Metropolitan Railway Company, but have not yet heard from them.

To this letter the reversioner's solicitors, on the 16th, replied, as follows:—

When our client completed his purchase, Mr. Bird, or, rather, his clerk, Mr. Vaughan, informed us that he did not know for certain who paid the ground-rent

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in respect of this house [216, Euston Road]; but he thought the former name was Penley; and our Mr. Hooper then wrote upon Mr. Bird's letter the words "late Penley." We subsequently ascertained from the secretary of the Metropolitan railway that the rent was paid to you on account of Colonel Penley. We have no doubt the railway officials were made aware of the notice to repair served upon the tenant; and, if you have any cause of complaint at all in the matter, it is, we think, against the railway for not informing you of the notice.

P.S. We send you a copy of the notice to repair.

On the 17th of April, 1875, Messrs. Remnant & Penley wrote to the reversioner's solicitors, as follows:—

We have seen Mr. Bell, the secretary of the Metropolitan Railway Company. He informs us that Mr. Hughes knows that arrangements have been made for complying with the notice. We have required that the repairs be at once proceeded with, and no doubt all will be done satisfactorily.

On the 19th, the reversioner's solicitors replied, as follows:—

In reply to your letter of the 17th instant, we beg to observe that only last week Mr. Hughes told us nothing whatever had then been done towards complying with the notice to repair.

On the same day the secretary of the company wrote to the reversioner's solicitors, as follows:—

Euston Road Houses. As the negotiations with your client have not resulted in a sale of the company's interest to him, and the weather is now favourable for a performance of the necessary works, our repairing staff will immediately take in hand the requisite repairs to the above premises.

The secretary also on the same day addressed the following letter to Messrs. Remnant & Penley:—

216, Euston Road. You may rely upon our at once commencing the necessary works in respect of the dilapidations accrued to the above premises.

We have been negotiating with Mr. Hughes for the sale of the company's interest to him in this and the adjoining premises; but the negotiations have fallen through. The delay in replying to your letters has simply arisen from my desire to ascertain from the company's surveyor whether there was any chance of effecting a settlement with Mr. Hughes.

Messrs. Remnant & Penley having forwarded the last-mentioned letter to the solicitors for the reversioner, the latter replied as follows:—

With reference to Mr. Bell's letter to you, we beg to say that the negotiations with Mr. Hughes were broken off in December last; and there has been ample time since then to have completed the repairs in accordance with the terms of the notice.

A writ of ejectment was issued at the suit of the reversioner on the 28th of April, 1875; and on the 29th the secretary of the railway company addressed the following letter to the plaintiff:—

Nos. 212, 214, 216, 218, 220, 222, 224, 226, and 228, Euston Road. I under-

stand that you are serving writs upon the various tenants of these houses, or some of them. I refrain from comment upon this course of proceeding, and simply beg to inform you that instructions were given to our repair department on the 19th instant to proceed with the needful repairs as quickly as possible. Any delay which has arisen has been simply attributable to the fact of our not having been advised that the negotiations for the sale to you of the company's interest had gone off.

To this letter the plaintiff's solicitors replied on the 30th, as follows:—

Your letter of the 29th instant, addresssd to Mr. Hughes, has been handed to us, the matter being in our hands. The usual notices to repair pursuant to the terms of the lease were duly served upwards of six months ago. No steps having been taken to comply with these notices, it became necessary for us to take the proceedings which have been commenced on behalf of Mr. Hughes, to whom no blame can be attributed in the matter. The negotiations mentioned in your letter were brought to a close so far back as the month of December last; since which time an ample opportunity has been given for doing the necessary repairs.

A long correspondence then ensued between the solicitors of the respective parties suggesting terms of compromise, but none were agreed to. Threats were held out by the company's solicitors of an application to the Court of Chancery for an injunction to restrain the plaintiff from further proceeding with the action: but these were not carried out.

It did not precisely appear when the repairs were actually commenced; but they were not fully completed until about the middle of June.

The cause came on for trial on the 16th of November, when a verdict was found for the plaintiff.

On the 20th of December the company's solicitors served the plaintiff with a notice of motion pursuant to Order LIII. of the Judicature Act, 1875, requiring him to shew cause why he should not be restrained from proceeding to execution. The affidavits filed with the notice stated, amongst other things, that the company presumed that the repairs need not be commenced until further notice from the plaintiff's solicitors, and that the six months within which the repairs were to be done would not include any time during which the negotiations were pending, and that the plaintiff's solicitors had not desired the repairs to be proceeded with, as during the winter months the weather was unfavorable for such repairs.

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Nov. 23, 1875. *W. G. Harrison.* The defendants seek by this application to restrain the plaintiff from issuing execution upon his judgment, and for relief against the forfeiture, as a Court of equity would formerly have relieved them under special circumstances. For this there is abundant authority. Thus, in *Wadham* v. *Calcraft* (1), Lord Eldon says: "The proceeding under the statute (2) applies only to an ejectment for non-payment of rent, and clearly there can be no relief against the breach of other covenants." But in a note to that case it is said: "This proposition has been since the subject of great consideration. In *Sanders* v. *Pope* (3), Lord Erskine relieved against the breach of a covenant to repair; holding the relief not confined within the limits stated by Lord Alvanley in *Eaton* v. *Lyon* (4),—'unavoidable accident, fraud, surprise, or ignorance not wilful,'—but to be given at discretion even against a wilful breach, where full compensation can be made." As a general rule, it may be assumed that a Court of equity would not relieve against a forfeiture for non-repair. But to that rule there are exceptions. Thus, in *Bargent* v. *Thomson* (5), where a lessor brought ejectment for breach of a covenant to repair within three months after notice, it appearing that out of twenty-two items twenty had been proceeded with and fourteen completed, that the works had been partially delayed by weather, and that no farther remonstrance had been made by the lessors, the Court restrained the action, and directed an inquiry whether the covenants had been performed. Sir John Stuart, V.C., there says: "The Court, no doubt, is bound to respect the obligations contained in a lease, and to hold an even hand between landlord and tenant. Tenants are expected to perform the covenants in their leases, and the Court will not permit a tenant to evade the stipulations he has entered into. But, if he honestly endeavours to perform them, the Court will not allow the lessor to insist upon an omission of a day, unless there be something in the covenants that makes time the essence of the contract." The question is whether the facts of the present case do not bring it within the principle thus laid down. The parties were negotiating

(1) 10 Ves. 67, 70.
(2) 4 Geo. 2, c. 28.
(3) 12 Ves. 282.
(4) 3 Ves. 693.
(5) 4 Giff. 473.

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for the sale of the defendants' interest in the lease to the plaintiff at all events down to the 31st of December, 1874; and the defendants had no distinct notice even then that the negotiations were finally broken off and all hope of a compromise at an end. The repairs were actually commenced before or about the time when the writ was issued, and they were completed before the day of trial.

Murphy, Q.C., shewed cause. The rule upon this subject is accurately stated in Story's Equity Jurisprudence, § 1321: "When the condition or forfeiture is merely a security for the payment of money (such as a right of re-entry upon non-payment of rent), then it is to be treated as a mere security, and in the nature of a penalty, and is accordingly relievable. But, if the forfeiture arises from the breach of any other covenant of a collateral nature; as, for example, of a covenant to repair, then, although compensation might be ascertained and made upon an issue quantum damnificatus, yet it has been held that Courts of equity ought not to relieve, but should leave the parties to their remedy at law." This statement is fully borne out by the judgment of Lord Eldon in *Hill* v. *Barclay* (1), and by the authorities collected in the notes to the cases of *Peachey* v. *Somerset* (2) and *Sloman* v. *Watter* (3), in White and Tudor's Leading Cases, 4th ed. pp. 1082, 1095. The demised premises being out of repair, the lessees had notice on the 23rd of October, 1874, that they were required to put them in repair pursuant to the covenants contained in the lease within six months. In November, the defendants' solicitors write to the plaintiff's solicitors promising that the required repairs shall be forthwith commenced. They further propose to sell their interest in the premises to the plaintiff: but on the 31st of December they are informed that the price they ask cannot be entertained: and they do nothing further until the six months notice has expired, and an action brought to enforce the forfeiture. And the jury find that the premises were out of repair at the expiration of the notice to the extent of 100*l.* If that which is now set up amounted to anything, it would amount to a waiver, and so would have been an answer to this action. The condition

(1) 18 Ves. 56. (2) 1 Stra. 447.
(3) 1 Bro. C. C. 418.

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of the premises at the time of the trial is not an ingredient in the consideration of the present question.

[LINDLEY, J. If the defendants had gone to a Court of equity immediately upon the writ being served, they would have been put under terms to do the repairs at once.]

If this had been an application to a Court of equity, the delay would have been fatal.

[LINDLEY, J. The plaintiff has not been injured by the delay: it is true he has sustained costs; but these he will recover.]

Harrison was heard in reply.

Cur. adv. vult.

Dec. 21, 1875. The judgment of the Court (Lord Coleridge, C.J., and Brett, and Lindley, JJ.) was delivered by

LORD COLERIDGE, C.J. In this case application was made to stay execution in an action of ejectment brought to recover possession of 216, Euston Road.

In 1787, the then Lord Southampton leased the house to James Haygarth for ninety-nine years. This lease ultimately became vested in Colonel Penley. The Metropolitan Railway Company were his under-lessees. The reversion expectant on the determination of the lease had been acquired by the plaintiff and was vested in him in October, 1874.

The lease of 1787 contained covenants on the part of the lessee to repair as often as need should require. It also contained a provision enabling the lessor to enter and view the premises, "and to give or leave notice in writing on the demised premises for the amendment of all defects and wants of reparation then and there found:" and the lessee further covenanted that he would "within six months next after every such notice well and sufficiently repair and amend and make good all such defects or wants of reparation and amendment, and all other defects and wants of reparation whatsoever in the demised premises." The lease also contained a clause in the usual form, enabling the lessor to enter for a breach by the lessee of any of his covenants. The underlease to the Metropolitan Railway Company was stated to contain similar covenants.

On the 22nd of October, 1874, the plaintiff left on the pre-

mises, a notice addressed to James Haygarth, his executors, administrators and assigns, and whomsoever it may concern, requiring him (and them) to do and perform certain repairs set forth in a schedule within six calendar months after the date of the notice.

This notice came to the knowledge of the Metropolitan Railway Company shortly after its date: but Colonel Penley did not in fact become aware of it until the 14th of April, 1875, which was only a few days before the expiration of the six months mentioned in the notice.

On the 28th of November, 1874, the surveyors of the company wrote to the solicitors of the plaintiff a letter which was as follows: [His Lordship read the letter set out, ante, p. 121].

After some correspondence, the plaintiff's solicitors, on the 31st of December, 1874, wrote to the company's solicitors this letter: [His Lordship read the letter set out, ante, p. 122].

We think it impossible to read this letter otherwise than as terminating the negotiations for a sale of the company's interest to the plaintiff, unless the company chose to re-open the negotiations by making a fresh offer.

The secretary of the company has made an affidavit stating that the company presumed the repairs need not be commenced until further notice from the plaintiff's solicitors, and that the six months from which the repairs were to be done would not include any time during which the negotiations were pending, and that the plaintiff's solicitors had not desired the repairs to be proceeded with, as during the winter months the weather was unfavorable for such repairs.

We are of opinion, however, that, even if the company did assume what is here stated, they were not led to do so by anything said or done by the plaintiff or his solicitors. It appears to us that the effect of the correspondence was this, viz. first, to give to the Metropolitan Railway Company a reasonable time to make a fresh offer; and, secondly,—if the negotiations were not renewed, —to give the company a reasonable time (but not necessarily six months) from the 31st of December to do the repairs required. The company, however, never made any fresh offer, and they allowed more than a reasonable time to elapse before they took any steps to repair. They did not in fact do anything until a few

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days before the expiration of the six months mentioned in the notice of October the 22nd.

It appears from the correspondence which has been placed before us that the plaintiff's solicitors learned that Colonel Penley had an interest in the property, and where to communicate with him, in January, 1875. On the 13th of April, 1875, they write to his solicitors this letter: [His Lordship read the letter set out, ante, p. 123].

This was the first intimation Colonel Penley had of the notice of October the 22nd. But it is to be observed that by serving the notice on the premises, the plaintiff had done all that he was to do under the circumstances.

Immediately on the receipt of this letter a copy of it was sent to the Metropolitan Railway Company; and on the 19th of April, 1875, instructions were given by the company to set about the repairs; but, whether they were actually begun before the writ was issued we have not been able to ascertain. However, the repairs were begun shortly before or after that date, and they were all finished by the middle of June.

The writ was issued on the 28th of April, 1875. The action was defended. No application was made to the Court of Chancery to stay the action, although such an application was more than once threatened. Ultimately, the action came on for trial; there was a verdict for the plaintiff on the 16th of November; and we are now asked to stay execution upon equitable grounds.

We are of opinion that we cannot do so. Courts of equity do not grant relief against forfeitures for breaches of covenant to repair, simply on the ground of hardship to the tenant. This is shewn, inter alia, by *Gregory* v. *Wilson* (1) and *Nokes* v. *Gibbon* (2), where relief was refused, although the tenant had employed a person to do the repairs, and he had done them, but had done them badly. There may, perhaps, be circumstances other than the conduct of the lessor which will entitle a tenant to relief, e.g., such a state of the weather as prevents the lessee from finishing the repairs within a given time, as was the case in *Bargent* v. *Thomson* (3); but the evidence before us does not shew the existence of any such state of things, nor any such special circumstances.

(1) 9 Hare, 683; 22 L. J. (Ch.) 159.
(2) 3 Drew. 681; 26 L. J. (Ch.) 433. (3) 4 Giff. 473.

There is no evidence to shew that the repairs might not have been done between the end of December, 1874, and the 22nd of April, 1875, when the notice expired.

The fact that the repairs were done pending the action is no ground for relief; for, in doing them, the lessee was only doing what he was bound by his covenants to do; he was relieving himself from liability to an action for damages, to which he would have been exposed had he not repaired.

If in this case the lessees could shew any conduct on the part of the plaintiff disentitling him in equity from enforcing his legal rights, a case for relief would be established; but we can find no such conduct. The negotiations with the railway company are not sufficient for the purpose; nor is the absence of notice to Colonel Penley personally before April, 1875, of the want of repairs; nor is there anything in the correspondence with Colonel Penley's solicitors which gives him any equitable rights: nor is there anything to shew that the plaintiff induced the railway company to make the repairs upon the assumption that if they were done the action would not be proceeded with. The correspondence which took place pending the action shews that the plaintiff intended to go on with it notwithstanding the repairs, unless the defendants would agree to pay a higher rent.

However harsh the conduct of the plaintiff,—and we think it *was* harsh,—we cannot interfere with his exercise of his rights, except upon some recognized principle of equity; and we are unable to find any on which we can deprive him of his right to issue execution.

Having for these reasons come to a conclusion that the defendants never had any grounds for restraining the action, it is unnecessary to consider whether, if there had been at one time equitable grounds for relief, the defendants would have been prevented by their own delay from obtaining relief at so late a stage in the proceedings as that at which the present application was made.

Motion refused, with costs.

Against this decision the defendants appealed.

Feb. 16, 1876. *Kay, Q.C.*, and *W. G. Harrison*, for the defendants.

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The defendants are entitled in equity to relief against the forfeiture on the ground that the landlord misled them into supposing that during the negotiations for purchase of the premises the notice to repair was suspended. It is true that as a general rule equity will not relieve against forfeiture for breach of a covenant to repair, that is to say, equity will not treat a condition for re-entry in such a case merely as a security, as in the case of a condition for re-entry for non-payment of rent, but in cases of mistake, accident, or surprise, and more especially where the conduct of the landlord has conduced to the mistake, it has always been held that there is a right to relief. [They cited *Bargent* v. *Thomson* (1); *Gregory* v. *Wilson* (2); *Hill* v. *Barclay*. (3)]

Murphy, Q.C., and *C. S. C. Bowen*, for the plaintiff. The application for relief in equity is too late. The defendants ought not to be allowed to take their chance at law, and having persevered until verdict, then to fall back upon their equitable rights.

[JAMES, L.J. The plaintiff is not prejudiced. Equity will only relieve the defendants after verdict, on the terms that they shall pay all the costs of the action at law.]

The reasonable construction of the correspondence is not to suspend the six months' notice indefinitely. A reasonable time was left for the execution of the repairs after the cessation of the negotiations. The defendants ought to have made a fresh offer after the 31st December, and not having done so, are not entitled to assume that the notice was suspended for an indefinite period. It was for the tenants to warn the landlord that they considered the notice suspended. Secondly, it is contended that if the correspondence affords any defence at all, it was a defence at law, and cannot now be raised. There was in this lease a general covenant to repair, as well as a covenant to repair on notice. There was a breach of this general covenant which was no doubt waived temporarily by the notice to repair within six months, but the failure to repair within the six months would revive it. If the correspondence amounts to a defence, it must be because it amounts to

(1) 4 Giff 473. (2) 9 Hare, 683; 22 L. J. (Ch.) 159.
(3) 18 Ves. 56.

a contract not to take advantage of this covenant. [They cited *Doe* v. *Meux* (1); *Few* v. *Perkins*. (2)]

Kay, Q.C., in reply.

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JAMES, L.J. This case must be treated in the same way as if a bill in equity had been filed for relief against the forfeiture after a judgment had been obtained at law. The facts of the case are these. The premises appear to have been of considerable value, and they were let upon on old repairing lease at a ground rent of ten shillings. At the time of this transaction the Metropolitan Railway Company were the tenants. The tenants were a company possessed of ample means, and quite able at any moment to lay out what might be requisite for repairs. There being in the lease a general covenant to repair, and a covenant to repair on six months' notice, the lessor gives notice of dilapidations. The company write in answer to the notice, and say that they are ready to do the repairs forthwith, but they suggest that it would be worth the landlord's while to purchase their interest, and state that they intend to suspend the repairs while the proposition is considered. The answer to that letter states that if the company are willing to sell their interest in all the houses, the landlord will, on a price being named, consider whether he will purchase, and asks for particulars of the tenancies and rents paid to the company, &c., clearly acquiescing in the postponement of the repairs. This letter and those subsequent to it convey the idea that an arrangement for the purchase of these premises was not at all improbable. On the 30th of December the company write back and offer to surrender all the houses for 3000*l.*, and inclose a schedule of particulars of all the property. The answer to that letter is, that having regard to the state in which the houses now are, and the large expense which would be necessary to put them into proper condition, the whole of which the company would have to bear, the price named is out of all reason; and requests the company to reconsider the question of price, and modify their proposal, having regard to the company's being already under notice to repair. This letter clearly implies that the time under the notice is suspended by the common consent of the parties during nego-

(1) 4 B. & C. 606. (2) Law Rep. 2 Ex. 92.

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tiations for the purchase of the houses unrepaired. Up to this time there seems to me to have been a complete acquiescence in the proposal that the company should not begin doing the repairs until such negotiations are at an end. There certainly is no subsequent letter from the company making a modified proposal, but the company would not unnaturally consider that there was no great hurry about the matter. The plaintiff's attorneys again, on the 6th of January, write in a perfectly friendly tone, asking for the address of Colonel Penley. For what reason could they have wanted his address, except for the purpose of some negotiation with regard to the property? The company answers, giving the address of Colonel Penley. The plaintiff gives no intimation warning the company that the time for doing the repairs is running on, but waits till the 13th of April, within a few days of the expiration of the six months, and then, when there was no longer time to do the repairs, writes the letter to Colonel Penley's solicitor insisting on the company's failure to do the repairs under the notice. I am of opinion, sitting as a judge both of fact and law, that the effect of the correspondence is that the lessor intentionally lulled the defendants to sleep until the six months were nearly over, and it was too late to do the repairs. It is clearly against equity and good conscience that under these circumstances he should take advantage of the forfeiture; and the case is one of those in which a Court of Equity had, and therefore in which this Court has, jurisdiction to relieve against it. The judgment of the Court below must be reversed.

Rutson 2 Ass Cas 463 454.

MELLISH, L.J. I am of the same opinion. I have had some doubt whether this application was not too late. But, as this case was a remanet of the old system, and the defendants probably had no real opportunity of raising this equity by pleading, I think it may be raised by way of application after verdict, but it must not be supposed to follow that a party may in future omit such a defence from his pleading, and seek to set it up after verdict. The question therefore is whether the defendants are entitled to equitable relief. It is suggested that what occurred, if a defence, amounted to a waiver of the six months' notice, and that such waiver would have been a legal defence and ought to have been

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raised on the trial. But I think that there is a clear difference between what would amount to a waiver and this equity. In the case of a waiver, the Court must see whether there was an intention to abandon the notice, and I do not think that anything in this correspondence amounts to this. But, even if the plaintiff did not intend to abandon the notice, yet, if his conduct was such as to put the defendants off their guard, and to lead them to believe that the six months' notice would not be insisted on, there is a ground for giving relief in equity. The result of waiver is different, for the notice is gone at law; whereas a Court of Equity, though they relieve against the forfeiture, will still compel the lessee to put the house into substantial repair, and will give the landlord all that he is really entitled to, only preventing him from enforcing a forfeiture that would be inequitable. I think these letters clearly shew that the plaintiff did consent to enter into a negotiation for the sale of the premises in their unrepaired state. When a house is very old and dilapidated, every one knows that the best course, and the most profitable to the landlord, may be to pull the whole down and rebuild it; and if this were the landlord's intention, it would be merely throwing away money to do the repairs. Therefore, when the landlord enters into a negotiation for the purchase of the premises, it would be absurd to go on with the repairs. It does not appear to me that the letter of the 31st of December put an end to the negotiation. The letter assumes that another offer will be made. It is argued that the defendants ought to have answered sooner. It seems to me, however, that if the plaintiff meant to insist on the notice, he should have warned the defendants that the notice was running.

BAGGALLAY, J.A. I am of the same opinion. The rule is that a Court of Equity will not in general relieve against a forfeiture for breach of a covenant to repair. The general principle in equity as well as at law is that a man must observe the engagements he has thought fit to enter into; but there are special circumstances under which equity will grant relief, and of these exceptions to the general rule none are more ordinarily before the Courts than cases of surprise, mistake, and inevitable accident. The correspondence has been fully discussed by the Lord Justice

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James. On full consideration of it, I think it may be fairly treated as being of such a character as to lead the company to think that the notice to repair was at all events suspended during the negotiation, and I find it stated on the affidavit that the company were so misled. It seems to me that the case clearly falls within the class of exceptions to which I have referred.

MELLOR, J. I am of the same opinion. It appears to me, that the reasonable effect of the letters was to induce the defendants to stay their hands and not do the repairs. I apprehend that, whether the correspondence was intended to have that effect or not by the plaintiff is immaterial, if the result was that by the plaintiff's conduct the defendants were reasonably entitled to suppose that they might stay their hands. That result seems to have been produced here, and I therefore agree that the relief asked for should be granted.

CLEASBY, B. The question now raised is, whether the plaintiff's conduct has been such as in equity to disentitle him from insisting on the forfeiture. It appears to me that conditions of re-entry for breaches of covenant are conditions essential to the due protection of the landlord: and so far as is consistent with equity, full effect ought to be given to such conditions. The decision of this case depends on the question what the state of things between the parties was after the 31st of December. It was quite plain that there was up to then a negotiation pending for a purchase by the landlord, in substitution for the performance of the repairs under the notice to repair.

If actual negotiation had been going on till the expiration of the period of six months, it would have been idle to contend that the landlord could have equitably insisted on the notice. The real question is, how long the negotiation can be said to have continued. It was continued after the 31st of December, by the request to the defendants to reconsider their proposal. The next step was to be taken by the defendants, and they do nothing. How long would they have a right to do nothing, and how long, if they did nothing, would the negotiation continue and the notice remain suspended? Would not the landlord be entitled to consider the

negotiation at an end when a fair time had elapsed? It is admitted that it cannot be considered that the notice is gone altogether and that a new period of six months must be given; but if the notice continues, great uncertainty results from the view that it is suspended as to the rights of the parties, and as to the interval which is to be deducted in respect of the negotiation. I am not prepared to dissent from the judgment of the Court, though I think the case involves considerable difficulties.

Judgment reversed.

Solicitors for plaintiff: *Davies & Co.*

Solicitors for defendants: *Burchells.*

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Feb. 23.

Charterparty—Freight pro ratâ—Cargo sold at Intermediate Port to raise Money for Repairs of Ship.

40 D. 835

Freight was payable by the terms of a charterparty upon delivery of cargo at the port of destination. The ship meeting with sea damage from heavy weather, the captain at an intermediate port justifiably sold part of the cargo shipped by the charterer, to raise funds for the necessary repairs. The cargo so sold fetched more than it would have done if carried to the port of destination. The ship, having completed her repairs, proceeded to the port of destination with the remainder of the cargo. A general average statement was afterwards made up, under which the charterer received from the shipowner the amount realized by the cargo sold at the intermediate port. The shipowner claimed from the charterer freight pro ratâ itineris on the cargo so sold:—

Held, that he was not entitled to such freight.

DECLARATION for freight, and for money received for the plaintiff's use.

Plea (inter alia), never indebted.

Issue.

The facts, as proved at the trial before Huddleston, B., at the last Liverpool summer assizes, were as follows:—

The plaintiff, a shipowner, had chartered a ship to the defendant to carry a cargo of coals from Cardiff to Point de Galle, at a freight of 21*s.* per ton on the quantity delivered at the latter place. The defendant duly shipped a cargo of 704 tons of coals. On her voyage the ship met with bad weather, and

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suffered sea damage, and it was necessary to repair her at the Cape of Good Hope. For this purpose the captain, not having any funds, and not being able to raise any on bottomry or otherwise on the owner's credit, sold a portion of the coals, amounting to 470 tons, to defray the expense of the repairs, and having completed the repairs, sailed to the port of destination with the remainder of the cargo, 42 tons having been jettisoned, and 470 tons sold as before mentioned. The price of coals being very high at the Cape of Good Hope, it turned out that the coals sold there fetched 3*l.* 3*s.* 6*d.* per ton, a much higher price than if they had gone on to Point de Galle. The coals cost originally 1*l.* per ton. There was a general average statement made up, and in accordance with that statement the defendant received from the plaintiff the net proceeds of the coals sold at the Cape of Good Hope, but the statement did not make any allowance in respect of freight on those coals to the plaintiff. The plaintiff contended that he was entitled to pro ratâ freight in respect thereof, and consequently sought to recover back the amount of such freight. On these facts the verdict was entered for the plaintiff for the freight claimed, with leave to the defendant to move to enter a nonsuit or a verdict, on the ground, amongst others, that there was no liability on the part of the defendant to pay the freight claimed.

A rule nisi had been obtained accordingly.

Herschell, Q.C., and *Crompton*, shewed cause. The captain was justified in selling the coals by the maritime law. The sale of the part of the cargo is for the benefit of all concerned, in order that the adventure may be carried on. The case is distinguishable from *Vlierboom* v. *Chapman* (1), because there the voyage was never completed, and could not be completed because the cargo would have become entirely rotten from the effects of sea damage. The sale, therefore, was solely for the benefit of the cargo owner, the adventure being abandoned by reason of perils of the sea. Here the sale was of part only, in order that the adventure might be carried on.

The value of the coals at the Cape of Good Hope was partly made up of the cost of carriage there. It is inequitable that the

(1) 13 M. & W. 230.

cargo owner should get the benefit of that without paying any freight. Why should he get a greater benefit by reason of the goods being sold than he would have done if they had been carried on? All that he is entitled to is an indemnity from loss. Under these circumstances an implied contract to pay freight pro ratâ arises. The cargo owner is entitled, instead of claiming an indemnity, to take the proceeds of the goods at the intermediate port; but if he elects to do so, it is the same as if he received the goods at the intermediate port, and then he must pay freight pro ratâ. Having paid the sum due according to the average statement in ignorance of the facts, the plaintiff can recover back so much as is equivalent to the freight pro ratâ. [They cited *Campbell* v. *Thompson* (1); *The Gratitudine* (2); *Duncan* v. *Benson* (3); *Benson* v. *Duncan* (4); *Baillie* v. *Mogdigliani* (5); Park on Insurance, p. 60.]

Benjamin, Q.C., and *Myburgh*, supported the rule. The effect of the transaction is that the proceeds of the goods, which the captain is entitled by the maritime law to sell in order to meet a pressing necessity, are in the nature of a forced loan by the cargo owner to the shipowner to enable him to carry out the adventure. The cargo owner is entitled to recover such proceeds as a sum borrowed. The contract to pay freight pro ratâ only arises when the cargo owner has an option to take the goods short of their destination or to have them carried on. Here he has no option. The cargo owner has the option of treating the transaction as a loan at the intermediate port, or of demanding an indemnity for the loss sustained by non-delivery at the port of destination. If he adopts the latter alternative he must of course be content with the amount that would have been the proceeds at the port of destination, less the freight which would have been earned in carrying the goods there; but if he elects to put the case as one of a loan, there is no ground for implying a contract to pay freight pro ratâ. [They cited *Atkinson* v. *Stephens* (6); *Hallett* v. *Wigram* (7); *Richardson* v. *Nourse* (8); *Hunter* v. *Prinsep*. (9)]

(1) 1 Stark. 490.
(2) 3 C. Rob. Adm. at p. 259.
(3) 1 Ex. 537; 17 L. J. (Ex.) 238.
(4) 3 Ex. 644; 18 L. J. (Ex.) 169.
(5) 6 T. R. 421, n.
(6) 7 Ex. 567; 21 L. J. (Ex.) 329.
(7) 9 C. B. 580; 19 L. J. (C.P.) 281.
(8) 3 B. & Ald. 237.
(9) 10 East, 378.

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BRETT, J. In this case the plaintiff seeks to recover either in respect of freight or money received to his use. He cannot recover the sum of money which he claims as money had and received unless he is entitled to freight. And so the main question is whether he is entitled to the freight. It is to be taken that the circumstances were such that the captain by the general maritime law was justified in selling part of the charterer's cargo, and that such sale was not a wrongful act. Such a right arises, although it is the duty of the shipowner to repair the ship ultimately at his own expense.

The coals so sold fetched more at the Cape of Good Hope than they would have done at Point de Galle, and the suggestion is, that under these circumstances the plaintiff is entitled not only to freight on the cargo actually delivered at the port of destination, but also to freight in respect of the coals sold at the Cape of Good Hope. Now, it is obvious that the only freight expressed to be payable by the terms of the charter is a freight of 21*s.* per ton on cargo delivered at Point de Galle, so that this freight now claimed is not the charter freight. I know not how freight can become due under such a charter as this in respect of goods not carried to the port of destination otherwise than with reference to the doctrine of freight pro ratâ. What, then, is the principle governing the question whether such freight is payable? It is only payable when there is a mutual agreement between the charterer or shipper and the captain or shipowner, whereby the latter being able and willing to carry on the cargo to the port of destination, but the former desiring to have the goods delivered to him at some intermediate port, it is agreed that they shall be so delivered, and the law then implies a contract to pay freight pro ratâ itineris. Do the present circumstances come within that principle? The captain here is not able and willing to carry the coals on; he puts it out of his power to do so by the act of selling them. Again, the charterer has no option with regard to the sale at the intermediate port. The essential grounds of the inference which the law draws of an implied contract to pay freight pro ratâ do not exist. It is said by Mr. Crompton that the charterer has an option. I agree that he has, but I do not think any implication of a promise to pay freight pro ratâ can be drawn from it.

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He has, I think, an option to treat the proceeds of the sale as a loan, or he may say, "You have sold my goods against my will, and though by the maritime law that is not a wrongful sale, still I am entitled to and claim an indemnity against any loss occasioned by the sale." If he selects the former alternative, what is there to give rise to an implication that freight pro ratâ is payable? If he thinks that the goods have fetched more at the intermediate port than the remainder will do at the port of destination, why may he not treat the transaction as a loan at once and sue for the amount before the ship arrives at her destination? If the ship should be lost on her voyage between the intermediate port and the port of destination the charterer has no option; he cannot ask for an indemnity on the footing that the goods would have fetched more at the port of destination. The basis of the claim of indemnity in such a case is the supposition that the goods would fetch more at the port of destination than they did when sold. If the ship is lost the charterer or shipper never can claim an indemnity against the shipowner; the adventure is lost by perils of the sea. But I apprehend, though he could not claim an indemnity, he could treat the transaction as a forced loan, and claim the amount of the price for which the goods were sold. If the goods fetch more at the intermediate port, the owner of the cargo naturally would elect to treat the matter as a loan, but when he thinks it for his interest to insist and does insist on an indemnity on the footing that the value of the goods must be treated as if they were carried to their destination, then he must allow for the freight that would have been earned by carrying them there. Here the defendant had a right to treat the proceeds of the sale as a loan, and did so, and under those circumstances I see nothing to raise an implication of a liability to pay freight pro ratâ. This decision may seem hard, but the hardship, if any, arises from the form of the contract entered into. The loss to the shipowner is a loss by maritime perils, and the answer to any argument of hardship seems to me to be that this is a case in which the proper remedy is by insurance of freight.

ARCHIBALD, J. This question turns on whether or no the

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plaintiff is entitled to pro ratâ freight. I think that under the circumstances he is not. I take it that under a charter such as this there can be no right to freight unless the goods are delivered according to the charter, or a new contract is made between the parties, or facts exist from which such new contract may be inferred. Now can such a new contract be inferred here? The facts from which we are asked to infer one are that the goods have been sold justifiably in a case of necessity, and that the amount of the proceeds has been paid to the defendant. I do not think these facts alone are sufficient to raise the implication suggested. The proceeds might be received under such circumstances as to give rise to an implication of a contract to pay freight, but the mere receipt of the proceeds is not sufficient. *Baillie* v. *Mogdigliani* (1) has been referred to as establishing that the receipt of the proceeds of a sale at an intermediate port is the same as that of the goods themselves; but the case of *Hunter* v. *Prinsep* (2) shews that the inference cannot be drawn in that absolute way. I agree that the case in which the implication can be drawn is when the captain is able to carry the goods on and the charterer chooses to have them delivered short of the port of destination. Here the charterer had no option. The sale though made justifiably, under circumstances of necessity, was a disposition of his property without his having any option in the matter. The true view seems to me to be that the transaction is in the nature of a forced loan, and consequently that the charterer is entitled to recover the amount of the proceeds of the sale as a loan.

The cases also establish that if the vessel reaches her destination the cargo owner may, instead of treating the transaction as a loan, claim compensation by way of indemnity. He would only do that if the goods realized less at the intermediate port than they would have done at the port of destination. It does not seem to me that the mere receipt of the amount of the proceeds is equivalent to a receipt of the goods at the intermediate port, or affords sufficient ground for an inference that the defendant agreed to pay freight pro ratâ.

(1) 6 T. R. 421, n. (2) 10 East, 378.

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LINDLEY, J. I am of the same opinion. The goods never were delivered at the port of destination, therefore the freight was not earned under the charter. The whole argument of the plaintiff, therefore, rests upon the fact that the defendant received the amount of the proceeds of the sale. If the transaction could be treated at the option of the defendant as a loan of money it is clear that the receipt by the defendant of the money was not equivalent to receipt of the goods at an intermediate port, and the argument wholly fails. The rule must be made absolute.

Rule absolute.

Solicitors for plaintiff: *Oliver & Botterill.*

Solicitors for defendants: *Hollams, Son, & Coward.*

[IN THE COURT OF APPEAL.]

Feb. 11.

GRANT *v.* THE BANQUE FRANCO-EGYPTIENNE.

Practice—Appeal—Security for Costs—Time for making Application—Rules of Supreme Court—Order LVIII., Rule 15.

12 L.D.S.H. 22 Ch.D. 84

After the costs incident to an appeal have been actually incurred by the respondent, and the time is fixed for the hearing of the appeal, it is too late to apply for an order that the appellant shall give security for costs.

THE Banque Franco-Egyptienne, who were a société anonyme, carrying on business in Paris, instituted proceedings in the Mayor's Court of the City of London against the Atlantic and Great Western Railway Company, an American company, to recover 231,676*l.*, and issued an attachment against moneys of that company in the hands of Messrs. Albert and Maurice Grant. Messrs. Grant then instituted the present proceedings in prohibition against the Banque and the Corporation of London. The defendants pleaded to the plaintiffs' declaration, and the plaintiffs demurred to the pleas. The plaintiffs resisted the attachment in substance on the grounds that the parties to the suit in the Mayor's Court did not carry on business within the City, and that the two companies were corporations, and were therefore not subject to, and could not avail themselves of, the custom of foreign attachment. On the authority of the decision of the Common Pleas

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Division in *London Joint Stock Bank* v. *Mayor of London* (1), the plaintiffs' demurrer was, on the 17th of January, 1876, allowed by the Common Pleas Division without argument. The Banque then gave notice of appeal. The day appointed for the hearing of appeals from the Common Pleas Division was the 15th of February, and this appeal stood second in the list. The hearing was not, however, actually commenced until the 16th of February. On the evening of the 15th of February the Messrs. Grant served the Banque with a notice that an application would be made to the Court of Appeal, on the 18th of February, that the appellants might be ordered to give such security for the costs to be occasioned by the appeal as might be directed by the Court pursuant to the provisions of Order LVIII., Rule 15, of the Rules of the Supreme Court. On the 16th of February the appeal came on to be heard, and it was then found that the plaintiffs' declaration did not distinctly allege that the two companies were corporations, and an order was ultimately made that the hearing of the appeal should stand over, with liberty to the plaintiffs to amend their declaration. The motion for security for costs came on to be heard.

Lumley Smith, for the plaintiffs.

C. H. Anderson and *Warmington*, for the defendants, contended that the application was made too late, as the costs had been actually incurred.

JAMES, L.J. The motion must be refused with costs. It is too late to make the application, so far as regards any costs already incurred, after the time had been actually fixed for the hearing of the appeal, and it is too early, so far as regards any future costs which may be occasioned by the standing over of the appeal and the amendment of the pleadings. There may be no such costs. The order refusing the motion will, however, be made without prejudice to any application with respect to future costs.

MELLISH, L.J., BAGGALLAY, J.A., and CLEASBY, B., concurred.

Solicitors for plaintiffs: *G. S. & H. Brandon.*
Solicitor for defendants: *A. G. Ditton.*

(1) 1 C. P. D. 1.

MOSTYN *v.* THE WEST MOSTYN COAL AND IRON COMPANY, LIMITED.

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Feb. 14.

Lessor and Lessee—Absence of Title to Part of Premises demised—Concealment—Equity to have the Lease set aside—Implied Covenant for Title, Damages for Breach of—Right of Lessee to reject Part of demised Premises—Counter-claim—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *ss.* 24, 34—*Order XIX., Rule* 3—*Jurisdiction.*

Where the defendant in an action in one of the Divisions of the High Court of Justice other than the Chancery Division relies on an equity to have a deed set aside as part of his defence, the Division in which the action is may give effect to the equity so far as is incidental to the purposes of the defence.

It is not essential to a good counter-claim that it should shew a claim to an amount equalling the plaintiff's claim.

The lessor of certain lands knew that as to part of them he had no title to grant the lease. The lessee did not know, and had no means of knowing, that such was the case, and the lessor did not disclose the want of title to him:—

Held, that it was not necessary in equity, in order that the lessee might be relieved of the lease, that there should have been any affirmative fraud, and that the concealment by the lessor of a fact affecting the title to a material part of the demised premises was a sufficient ground for treating the lease as set aside.

A lease having been granted by deed in terms from which the law implies a covenant for title, and the lessor proving to have no title to part of the demised premises:—

Held, that the lessee might refuse to take possession of such part of the demised premises, and elect to keep the remainder, and might in an action for rent due under the lease claim damages for breach of the implied covenant by way of counter-claim.

DECLARATION for that the plaintiff, by indenture of lease dated the 25th of March, 1874, let to the defendants all and every the coal mines, seams of coal, ironstone, &c., under certain parcels of land delineated on a plan thereunto annexed, and containing by estimation 2211 acres, to hold the demised premises from the 24th of June, 1873, for the term of sixty years thence ensuing at the rent of 1*s.* for the first year of the said term, and during the next seven years of the said term the rent of 1200*l.* a year, and other rents and royalties by the said indenture reserved, of which rent of 1200*l.* two quarters were due and unpaid.

Statement of defence pleaded under the new rules, was in substance as follows.

After admitting that by an indenture of lease dated 25th of March, 1874, the plaintiff purported to demise the coal mines in

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question to the defendants, and that half a year's rent would have become due on such lease, except for the matters thereinafter mentioned, it proceeded: "And by way of set-off and counter-claim the defendants claim as follows:—

"3. A large portion of the said parcels of land in the said admitted lease mentioned, to the extent of 968 acres or thereabouts, is situate and lies below the low-water mark of the river Dee, and a further large portion of the said parcels, to the extent of 1000 acres or thereabouts, no part of which said portions respectively is within a certain manor there called the manor of Picton and Axton, is situate and lies below the high water-mark of the said river.

"4. The defendants, after the making of the said admitted lease, and before the claim made on behalf of the Crown as hereinafter mentioned, and without any knowledge or notice of the rights mentioned and referred to in such claim, took a lease from one John Lord Hanmer for a term of forty years at a yearly rent of 500*l.* of the mines, seams, and beds of coal, with their appurtenances, lying under 2270 acres of land or thereabouts adjoining the said land in and by the said admitted indenture purported to be demised by the plaintiff to the defendants, and are sinking shafts in the said last-mentioned land with a view of working the mines, &c., from under the whole of the lands hereinbefore referred to through such shafts, and have expended on such sinking of shafts very large sums of money.

"5. On or about the 23rd day of August, 1875, a formal claim on behalf of the Crown was made by the Commissioners of Woods and Forests upon the defendants, through their secretary, to the coal lying under the said portion of land below the low-water mark of the river Dee, and to the iron lying under the said portion of land below the high-water mark of the river Dee, except any part of such portions respectively as was within the manor of Picton and Axton aforesaid.

"6. The defendants, in consequence of such claim, and believing that the same was (as it is in fact) well founded in truth and in law, informed the plaintiff of the said claim, and declined to pay the said rent upon the same being demanded of them by the plaintiff.

"7. The plaintiff, at the time when he so made the said admitted indenture of lease, whereby he purported to demise the said premises so included therein, knew that the coal lying under the said portion of land below the low-water mark of the river Dee, and that the iron lying under the said portion of land below the high-water mark of the river Dee, did not belong to him, and that he had then no right or title to demise the same respectively, or either of them respectively, and the defendants had then no knowledge, or notice, or means of knowing that the said last-mentioned portion of land did not belong to the plaintiff, or that he had no right or title to demise the same respectively.

"8. In consequence of the matters mentioned above, the defendants are greatly embarrassed and delayed in the working of their said mines, as well under the said lands mentioned in the said admitted lease as under that mentioned in the said lease so granted as aforesaid by the said Lord Hanmer, and the said last-mentioned lease is rendered less valuable to them by reason of the said want of title of the plaintiff, such lease having been accepted and taken by them solely with a view of working the mines therein mentioned in conjunction with those which the plaintiff purported to demise, and the defendants have thereby also lost and been deprived of the moneys laid out and expended by them under and with reference to the said leases respectively, which they would not have laid out and expended if they had known of the plaintiff's want of title, and have lost and been deprived of the interest and profits which would have accrued to them from the use of the moneys so laid out and expended.

"The defendants claim:

"1. 100,000*l.* damages in respect of the matters stated in the above set-off and counter-claim.

"2. To have the said deed under which the plaintiff claims rectified or set aside upon such terms as to this Honourable Court may seem just, and, for the purposes aforesaid, to have this action transferred to the Chancery Division.

"3. To have such further or other relief as the nature of the case may require."

Demurrer.

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Philbrick, Q.C., (*Hawkins, Q.C.*, and *Gardiner* with him), for the plaintiff. This Division has no power to rectify or set aside the deed. The jurisdiction to do that is reserved to the Chancery Division by the 3rd subsection of the 34th section of the Judicature Act, 1873. It is not competent to the defendants to keep one part of the thing demised, and have the lease set aside as to the other part. The rent is an entire rent issuing out of the whole. Unless the defendants have never taken possession of any part, or have been evicted and elect to give up the whole, they cannot be entitled to have the lease set aside. It cannot be taken on this record that the defendants have not entered into possession, and there was nothing amounting to an eviction. There is no ground for setting aside the lease in the absence of fraud, and there is no specific allegation of fraud. Mere non-communication of the want of title is not sufficient: Story's Equity Jurisprudence, 147–153; *Gilbert* v. *Lewis*. (1) With regard to the counter-claim for damages on the covenant for title, it does not appear that among the operative words the word "demise" was used. No case has actually decided that any word of leasing but the word "demise" will import a covenant for title. Moreover, no action, at any rate for substantial damages, could lie on the covenant in the absence of an eviction. The tenant having entered on the land, and not having been molested, but still being in complete enjoyment of the subject-matter of the demise, cannot recover in an action on the covenant. What would be the measure of damages? He cannot keep the lease and have his action. He is estopped from denying the landlord's title while he remains in possession of the demised premises or part of them. [He cited *Line* v. *Stephenson* (2), *Bandy* v. *Cartwright*. (3)]

Sir Henry James, Q.C., and *R. E. Turner*, for the defendants. On this record it is not to be assumed against the defendants that they have entered or that they remain in possession of the demised premises. There is a case made out for relief in equity. It is not necessary that there should be positive fraud.

[BRETT, J. Is there any allegation that the plaintiff knew that the defendants did not know of the absence of title?]

(1) 1 D. J. & S. 38; 32 L. J. (Ch.) 347. (2) 5 Bing. N. C. 183.
(3) 8 Ex. 913; 22 L. J. (Ex.) 285.

There is no direct allegation of that, but it may be inferred from the facts alleged and the position of the parties. It is not necessary that there should be an eviction; the lessee is not to be bound to go and commit a trespass, by working the mines which do not belong to him, to see if he will be evicted: *Edwards* v. *McLeay* (1), Sugden's Vendors and Purchasers, 14th ed. p. 246; *Torrance* v. *Bolton.* (2)

Secondly, there is a perfectly good counter-claim for damages. The defendants are entitled to reject the part of the demised premises to which there is no title, and bring an action on the implied covenant for title: *Neal* v. *McKenzie.* (3)

Philbrick, Q.C., in reply.

BRETT, J. The statement of claim alleges that by an indenture of lease the plaintiff let to the defendants certain coal mines, and there is no statement that the lease contained any express covenant for title or quiet enjoyment. The statement of defence bears two aspects. It assumes to answer the plaintiff's claim, and also, in case of its failing to amount to an answer, it sets up a counter-claim. The facts relied on by way of answer are these. It is admitted that there was a lease of the mines, but as to a part of them it is alleged that the plaintiff, when he demised them to the defendants, had no title, that he knew he had no title, and that the defendants did not know, and had no means of knowing, that this was so. Neither in the claim nor the defence is it alleged that the defendants are in possession of any part of the demised premises, and I think the case must be considered on the footing that the defendants have not taken possession. The defendants, on these facts, contend that a Court of Equity would set aside the lease. They allege that there has been a concealment by the lessor of a material fact with relation to the title to a considerable part of the premises which the plaintiff has let to them at an entire rent, which fact, if known to them, would have substantially affected the question whether they would take the lease of the whole or not. They say, therefore, that not having taken possession, they are entitled to throw up the lease altogether; that a

(1) G. Coo. 308; 2 Sw. 287. (2) Law Rep. 8 Ch. 118.
(3) 1 M. & W. 747.

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Court of Equity would have said, and therefore this Court will say, that under the circumstances they have a right to elect to do so, and to treat the demise as set aside. They further say that, although there has been no eviction, nor anything equivalent to one, yet as the plaintiff acknowledges that he has no title to part of the mines, and that he knew that he had none at the time of the demise, he cannot put upon the defendants the risk of working that part of the mines and being evicted, but that they are entitled to reject that part of the demised premises, and hold the plaintiff to the rest of the lease, and to bring their action for breach of the implied covenant for good title. Now it is, in the first place, suggested that, inasmuch as by the 34th section of the Judicature Act of 1873, the rectification, or setting aside, or cancellation of deeds or other written instruments is assigned to the Chancery Division alone, this Division cannot entertain the question of setting aside the lease; but it seems to me, that notwithstanding that section, the 2nd subsection of the 24th section of the Act gives equitable jurisdiction to this Division to this extent. If a defendant in an action in this Division sets up facts in his answer which in the Chancery Division would entitle him to have an instrument reformed or set aside, though this Division cannot reform or set it aside with regard to its effect in future, it may, for the purpose of determining the action, treat it as set aside. Another point which arises with regard to the effect of this statement as a counter-claim is this. Supposing the counter-claim to shew a right to some damages, but that it is obvious that the amount of such damages would not be equal to the amount of the claim to which it is pleaded, would it be demurrable? If it is to be treated as a set-off under the old system it is clear that it would, for a plea of set-off pleaded to the whole of the claim alleged that the set-off was of an amount equal to the claim. I think, however, that the 3rd Rule of Order XIX. shews that a counter-claim is not like a plea of set-off, for by that rule the counter-claim is to have the same effect as a statement of claim in a cross action. The meaning seems to be, that where there is a claim and counter-claim, the effect shall be similar to the effect under the old system, where the parties agreed that cross actions should be tried together, and judgments having been

given, there should be execution only for the balance of one judgment over the other, except that under the new system the judgment is to be only for the balance of one claim over the other. If so, the counter-claim will be good, if it shews a right to any amount of damages whatever, and no question arises as to whether the amount of the counter-claim equals the amount of the claim. Therefore when there is a demurrer to the whole of a statement of defence, if such statement shews a good counter-claim for any amount, the demurrer must fail, and the statement of defence stand good.

Having thus disposed of these preliminary points, the first question is, whether this statement of defence is good by way of answer to the action. Now, although there is a statement that plaintiff knew, and defendants did not and could not know, of the want of title to part of the demised premises, and that such a want of title was in respect of a part material to the enjoyment of the rest, still there is no allegation of anything amounting to fraud on the part of the plaintiff. The question is, whether a Court of Equity would, if a bill had been filed containing a statement of these facts, set aside the lease. If so, then there is a good primâ facie answer to the action.

I think the passage cited from Sugden's Vendors and Purchasers, 14th ed. p. 246, and the case of *Edwards* v. *McLeay* (1) are authorities to shew that equity in such a case as this will set aside the transaction. In Sugden's Vendors and Purchasers the effect of *Edwards* v. *McLeay* (1) is stated thus: "In a case where the sellers knew of a defect in the title to a part of the estate which was material to the enjoyment of the rest, and did not disclose the fact to the purchaser, and it could not be collected from the abstract, the purchaser was relieved against the purchase in equity. In *Edwards* v. *McLeay* (1) the Master of the Rolls (Sir William Grant) says, "Whether it would be a fraud to offer as good a title which the vendor knows to be defective in point of law it is not necessary to determine, but if he knows of and conceals a fact material to the validity of the title, I am not aware of any principle on which relief can be refused to the purchaser."

Therefore, I think that the facts stated are in this case an

(1) G. Coo. 308; 2 Sw. 287.

Cy 13th Ed. 267.

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answer to the action. Also, I think that the statement of defence, viewed as a counter-claim, is good, because it shews a right to some damages. I think the case of *Line* v. *Stephenson* (1) is an authority to shew that where an indenture of lease contains the word "demise," then if there be no express covenant either for title or for quiet enjoyment, there is an implied covenant that the lessor has a good title, and that the lessee shall have quiet enjoyment.

If there is an express covenant either for title or for quiet enjoyment, then there is no implied covenant at all. The case of *Hart* v. *Windsor* (2) is an authority that the word "let" has the same effect in this respect as the word "demise," and that any other equivalent word would have the same effect. I think we must take it on this record that the lease did contain the word "let" or "demise," and that there was no express covenant for title or quiet enjoyment. Also, we assume that there has been no eviction, or anything equivalent thereto. We do not think it necessary to decide whether what took place in the case of mines would be equivalent to an eviction.

There has clearly been a breach of the covenant for title, and we think that without any eviction the lessees, though there was a lease of the whole at one rent, would have a right to refuse to incur the risk of committing a trespass on the part to which there was no title, and to elect, instead of giving up the whole, to keep the part to which there was a good title, and have nothing to do with the other part, and sue for damages for the breach of the covenant for title. I do not think it necessary to determine whether there would in such a case be an apportionment of rent, because it seems to me that, whether there was an apportionment or not, the defendants would probably be entitled to some damages in respect of the breach of the covenant for title. It, therefore, seems to me that this statement of defence, whether as an answer to the claim or as a counter-claim, is good, and the demurrer must fail.

ARCHIBALD, J. I am of the same opinion. I entirely agree with what my Brother Brett has said with regard to our jurisdiction to give effect to an equitable defence based upon the right to

(1) 5 Bing. N. C. 183. (2) 12 M. & W. 68, 85.

have a deed set aside arising in the course of an action. Although the rectification and setting aside of deeds and other instruments are matters assigned to the Chancery Division, it nevertheless seems to me that, by the 2nd subsection of s. 24, where facts are brought forward by way of defence to an action, shewing that the instrument sued upon would be set aside in the Chancery Division on equitable grounds, we are bound to give effect to that defence. I also agree that the statement of defence is good by way of counter-claim, though it may not amount to an answer to the whole of the claim. The effect of the recent legislation has been to do away with much of the former technicality with regard to pleadings and to enable the defendant to make any claim in his defence in the nature of a cross action. If he sets out that which would be an answer to part of the claim only, such a statement must be allowed and will not be demurrable.

Now we must deal with the case for the purpose of this demurrer upon the facts as they appear on the statement of claim and statement of defence. The defendants rely on those facts as shewing, first, that there is a complete answer to the claim, inasmuch as a court of equity would, under the circumstances, set aside the lease; and, secondly, that there is a good counter-claim for damages in respect of the breach of an implied covenant for good title and quiet enjoyment. The facts stated by the defence and admitted by the demurrer are these: It is stated and admitted that the lease was executed, and that the rents would, but for the facts alleged in the statement of defence, have become due, but it is also stated and admitted that the plaintiff had no title to a large portion of the demised premises at the time of the demise; that he knew that he had no title, and that the defendants did not. It is suggested that there having been no eviction, these facts afford no ground of defence in equity. If this were so, the lessee might for many years have to pay rent and to run great risk with a very uncertain remedy against the lessor when eviction took place. The equitable rule is more reasonable than that.

Where there has been concealment of a material fact, though it may not amount to affirmative fraud, and though there has been no eviction, a Court of Equity will set aside the lease. *Edwards* v.

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McLeay (1) and the passages cited from Story shew that this is the equitable rule, and it seems to be one founded on common sense. With regard to the defence viewed as a counter-claim, I agree with my Brother Brett that the lease, as it appears on the record, imports a covenant for title and quiet enjoyment, and without saying what amount of damages the defendants would be entitled to for the breach of such covenant, it is sufficient to say that they would be entitled to some damages. If so, the counter-claim is good, and the demurrer must fail.

LINDLEY, J. I am of the same opinion. With regard to the question whether this Division is competent to decide the equitable question raised, I am of opinion that we have jurisdiction to decide it up to a certain point, at all events. I think we can decide it so far as it arises incidentally by way of defence to the action. Also, with regard to the nature of a counter-claim under the new rules, I agree with the rest of the Court. The statement of defence sets up certain facts, 1st, by way of answer to the claim, and, 2ndly, by way of counter-claim. The defendants first claim to have the deed rectified; that is out of the question, because there can only be a rectification in the case of mutual mistake, and when there is something to rectify the deed by; then the defendants claim that the deed should be set aside on such terms as the Court may think just. Such terms would involve that the lease should be given up to be cancelled, and should have been repudiated by the defendants in toto. We have, therefore, to consider whether the defendants have repudiated this lease in toto. The facts are these. It is stated by the defendants, and admitted by the demurrer, that the plaintiff concealed a material fact which was unknown to the defendants, and that the defendants have recently found it out, and it would appear that the defendants are ready now to repudiate the lease; but what does not so clearly appear, is whether they have done any act to prevent or conclude them from so repudiating it, as for instance, whether they have paid rent, or are in possession or not. On the whole, however, I think sufficient appears on this record to bring the case within the

(1) G. Coo. 308; 2 Sw. 287.

principle laid down in *Edwards* v. *McLeay* (1), and to entitle the defendants to repudiate the lease, and consequently that the defence is good by way of answer to the claim. I also agree that the defence is good by way of counter-claim, and that the defendants are entitled to some damages on the breach of the implied covenant for good title and quiet enjoyment. For these reasons the demurrer must fail, and our judgment must be for the defendants.

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Judgment for the defendants.

Solicitors for plaintiff: *Cullington & Slaughter.*
Solicitors for defendants: *Baxters.*

MORRIS *v.* LEVISON.

Feb. 10.

Charterparty—Construction of—Contract to load "full and complete Cargo, say about 1100 *Tons."*

A charterparty provided that the ship should proceed to the port of loading and there load "a full and complete cargo of iron ore, say about 1100 tons." The charterer provided a cargo of 1080 tons, the actual capacity of the ship being 1210 tons:—

Held, that the words, "say about 1100 tons," were not mere words of expectation, but words of contract, and that the charterer's undertaking was not to load the ship up to her actual capacity; but that 3 per cent. was a fair amount of excess over 1100 tons to allow in estimating what was a full and complete cargo of about 1100 tons, and consequently the cargo actually provided fell short of the charterer's obligation by 53 tons.

SPECIAL CASE, of which the facts, so far as material, were as follows (2):—

The action was upon the charter of a ship by the plaintiff to the defendant for not loading a full cargo. The charter provided that the ship should proceed to the port of loading and "there load a full and complete cargo of iron ore, not exceeding what she could reasonably stow, &c., say about 1100 tons."

(1) G. Coo. 308; 2 Sw. 287.

(2) Various matters were at issue between the parties besides that to which the present report relates, and the facts as actually set out in the case involved considerable complication. Inasmuch as it is not thought necessary to report the decision of the Court on the other matters in question, only so much of the case is given as relates to the point reported.

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The cargo which the defendant actually provided was 1080 tons and no more, the actual capacity of the ship being 1210 tons. The question for the Court was, whether the plaintiff was entitled to recover from the defendant any and what amount, and the Court was to have power to draw such inferences of fact as a jury might draw.

Butt, Q.C. (*J. C. Mathew* with him), for the plaintiff, contended that the defendant was bound to load a full and complete cargo according to the actual capacity of the vessel, or that if this were not so, the amount actually loaded did not satisfy the defendant's obligation. [He cited, in addition to the authorities referred to in the judgments, *McConnell* v. *Murphy.* (1)]

Cohen, Q.C. (*Wood Hill* with him), for the defendant, contended that the words, "say about 1100 tons," were inserted for the benefit of the charterer, that he might know about what amount of cargo to provide, and must be taken to be words of contract; that it could not be meant that the charterer should in any case be bound to load more than 1100 tons, and that his obligation was fulfilled by loading less than that amount, provided that the cargo loaded was about 1100 tons. He cited *Cross* v. *Eglin.* (2)

Butt, Q.C., in reply.

BRETT, J. The question which we have to decide is not an easy one, and I have felt some doubt on the matter; but I do not think that anything will be gained by taking time to consider our judgment. The question depends on the construction of the charter-party. By it the defendant undertook to load a "full and complete cargo of iron ore, 'say about' 1100 tons." It is only necessary to deal with the meaning of the expressions used with regard to the circumstances that arose. The cargo actually loaded was 1080 tons, and the ship could carry 1210 tons. It is obvious, therefore, that a full and complete cargo in the ordinary sense was not loaded, and the plaintiff seeks to recover in respect of the whole of the difference between what was loaded and what would constitute such a full and complete cargo. Now the contract, as all other contracts, must be considered with regard to the relation between

(1) Law Rep. 5 P. C. 203. (2) 2 B. & Ad. 106.

the parties, the subject-matter, and the state of the law, as to the construction of such contracts, when it was made. The relation of the parties is this. The shipowner undertakes to have the ship at the port of loading ready to load by the specified time, and the capacity of the ship ought to be in his knowledge. The charterer undertakes to have a cargo ready for loading at the specified time, and he may be bound to pay demurrage if, by reason of his not having the cargo ready, the ship is detained beyond the lay-days; but he cannot know the capacity of the ship so well as the shipowner. So much for the relation between the parties. Now with regard to the law. It had been decided in *Thomas* v. *Clarke* (1), and *Hunter* v. *Fry* (2), that when it was stipulated in a charterparty that the charterer should be bound to load a full and complete cargo, but at the commencement of the charterparty there was a statement of the capacity of the ship, such a statement had no effect on the contract to load a full and complete cargo; and, however much the actual capacity of the ship exceeded the statement, the charterer was bound to load such a cargo. Now we find that, instead of that statement at the commencement of the document, it has become usual to insert in the very sentence in which the charterer undertakes to load the phrase "say about" so many tons. Now it is a governing rule for the construction of a contract that, if possible, a substantial meaning must be given to every part of it. We have therefore, if possible, to give a meaning to the words "full and complete cargo," as well as to the words "say about 1100 tons." Taking into account the relation between the parties and the previous decisions, it seems to me impossible to hold that the words "say about 1100 tons" are what have been termed mere "words of expectation," and that they must be words of contract. It seems to me that we can give effect to all the words used by holding the meaning to be that the shipowner will be content with a cargo of about 1100 tons if the ship will hold more, and if she can only carry less, of course the undertaking of the charterer would be fulfilled by loading a complete cargo. If that were not the meaning of the stipulation, and the words "say about," &c., were only words of expectation, very great hardship

(1) 2 Stark. 450. (2) 2 B. & Ald. 421.

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would be entailed on the charterer, who must have his cargo ready at the port of loading by the appointed time, and who may be misled into having an insufficient cargo ready, and so may incur demurrage for detention of the ship, and damages for not loading a sufficient cargo. The reasonable meaning seems to be that the shipowner undertakes, if the ship is of much greater capacity than 1100 tons, to accept a cargo of about 1100 tons as equivalent to a full cargo, and thus effect is given to the words "say about," &c., as words of contract; but also effect is given to the words "full and complete cargo," for if the ship holds less than 1100 tons, then the charterer's obligation is fulfilled by loading up to the actual capacity. What, then, is the meaning of the word "about?" This is partly matter of fact, and partly matter of law. I think the direction to the jury has always been that the deviation must not be very large. The difference must be such as people would ordinarily consider as included in the word "about." There can be no exact rule of law as to the percentage of difference allowed, but I have known juries often allow in practice 3 per cent. Here we are placed in the position of a jury, and are entitled to find the facts, and we think that 3 per cent. above 1100 tons is somewhere about the right quantity to fix upon. If so, the undertaking was to load a full and complete cargo, but the shipowner undertook to be content with 1133 tons as a fulfilment of the contract. Only 1080 tons were loaded, and consequently defendant has loaded 53 tons short. Then the question arises what the damages are to be. It is argued that the plaintiff would not have netted the full freight on these 53 tons, which would be 49*l.* 13*s.* 9*d.*, because it would have taken somewhat longer to load the ship if the additional quantity had been loaded. I think the proper direction to a jury would have been that the plaintiff was entitled to the freight he would have received, less the cost of earning it, i.e., the net freight. It is difficult to ascertain this exactly, but we propose to deduct something from the gross freight, and in round figures we think, on the whole, that the plaintiff is entitled to 40*l.*

ARCHIBALD, J. I am of the same opinion. I have felt some hesitation as to the true construction of the charterparty. The

cases of *Gwillim* v. *Daniell* (1) and *Leeming* v. *Snaith* (2), which have been cited, related to the sale of goods; and in the former case the words "say from 1000 to 1200 gallons," were regarded as mere words of expectation; but in the latter case it was held that the words "say not less than 100 packs," were not mere words of expectation, but amounted to a contract. The nature of the subject-matter must be considered in determining what meaning is to be attributed to such expressions. The cases with regard to the sale of goods do not throw much light on the present case. This contract is for the charter of a ship, and the relative positions of the charterer and the shipowner must be considered. The charterer can hardly be expected to be so well aware of the capacity of the vessel as the shipowner. Taking this into consideration, I come to the conclusion that the words "say about" in this charter are not words of expectation, but of contract. I think we give sufficient effect to all the terms used by holding that the contract was to load a "full and complete cargo of say about 1100 tons," meaning thereby not merely that the parties expected that a full and complete cargo would be about 1100 tons, and that if the ship held more, then, however much more she held, the charterer was to be bound to load her up to her actual capacity, but that the shipowner would be content, and the charterer's obligation to load a full cargo should be fulfilled by loading the ship with a cargo of about 1100 tons. If he has not loaded a full cargo of about 1100 tons he has not fulfilled his obligation. Now I agree that 3 per cent. would be a reasonable per centage to allow, and if the vessel would carry more than 1100 tons, the charterer was bound to provide more cargo to that extent. I also agree that the damages ought not to be the full amount of the freight upon the deficiency, and that something ought to be deducted in respect of what it would have cost to earn such freight. I think that the sum mentioned by my Brother Brett is a reasonable amount to deduct, and that the plaintiff therefore should have judgment on this head for 40*l*.

LINDLEY, J. I am of the same opinion. I will only say a few

(1) 2 C. M. & R. 61. (2) 16 Q. B. 275; 20 L. J. (Q.B.) 164.

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words on the construction of this charter. We must look at the object with which those words, "say about 1100 tons," were put in. It seems to me that they must have been intended as a guide to the charterer with regard to the amount of cargo which he would have to provide. One construction suggested is that the words "full and complete cargo" are the governing words, and the words "say about 1100 tons" are mere words of expectation, that is to say, in plain language, that they are to have no effect at all. I do not think that can be the true meaning. It has the vice of giving no meaning to part of the language, whereas we ought, if possible, to give effect to all. The rival construction, viz. that the charterer could not be bound to load more than 1100 tons, seems to me to be open to the same objection. I think effect can be given to both the expressions, "a full and complete cargo" and "say about 1100 tons," by the construction we adopt, viz. that the obligation of the charterer is to provide a full and complete cargo, provided that such cargo shall not exceed about 1100 tons. Then with respect to the question, what cargo would not exceed about 1100 tons, I think the estimate of 3 per cent. excess is a fair one; and consequently that the charterer's obligation was to load a full and complete cargo, taking such a cargo as measured by that amount of excess over 1100 tons.

Judgment for the plaintiff.

Solicitors for plaintiff: *Waltons, Bubb, & Walton.*
Solicitors for defendant: *Ingledew, Ince, & Greening.*

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Feb. 16.

Master and Servant—Liability of Master for Negligence of Servant—Exception as to Fellow-servant or Fellow-workman.

The principle which exempts a master from liability to his servant for injury caused by the negligent act of a fellow-servant or fellow-workman, is, that the servant must be assumed to have contemplated and tacitly assented to encounter the ordinary risks incident to the service or employment, at the time of entering into the contract.

The plaintiff (who was a licensed waterman and lighterman) was in the employ at weekly wages of the defendant, a corn-merchant and warehousekeeper; his ordinary duty being to attend at the waterside of the premises every tide for about an hour and a half before and after high-water, for the purpose of bringing barges to and from the wharf and there mooring and unmooring them. It was no part of his duty to load or unload the barges or to assist in any way in the work of the warehouse: but it was his habit to go to the office on the land side of the warehouse for orders, or when sent for by the defendant's manager. There were two ways of going there, viz. by landing from his boat at stairs at the end of the street next adjoining the warehouse, or by stepping from the barges into and going through the warehouse and out by a door to the street. He usually went by this latter way. Being on the barges at a time when his actual duty did not require him to be there, he was sent for to the office, and was proceeding thither by his accustomed route, when, in passing out from the warehouse door to the street, he was knocked down and injured by a sack of grain which another of the defendant's men was in a negligent manner hoisting by means of a crane from a waggon:—

Held, that this was an injury caused by the negligence of a fellow-workman, within the above-mentioned exception, and consequently that the master was not liable.

THE declaration stated that the defendant by his servants so negligently hoisted up certain sacks from a waggon into the defendant's warehouse, that one of the sacks fell upon the plaintiff, whereby he was thrown down and hurt.

Second plea. That the injury was committed by servants of the defendant, and solely by their negligence, and not by the negligence of the defendant personally, and without the authority, knowledge, sanction, or consent of the defendant; that such servants were reasonably fit and competent to be employed; that the plaintiff was also the servant of the defendant and was then acting with the first-mentioned servants in one common employment; and that the defendant was not personally guilty of any negligence. Issue thereon.

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The cause was tried before Lindley, J., at the sittings in London after Trinity Term, 1875. The facts were as follows:—The plaintiff is a licensed waterman and lighterman. The defendant is a corn-merchant, miller, warehouseman, and wharfinger, carrying on business at Sufferance Wharf and Providence Wharf, College Street, Belvedere Road, Lambeth. He is also the owner of several barges. The plaintiff had been for about three months in the employ of the defendant when the accident complained of took place; his duty being to attend to the mooring and unmooring of the barges when they were brought to the premises to be laden or unladen, and which usually occupied him for about an hour and a half before and after each high tide, and for which he received wages of 24*s.* per week.

About 6 o'clock in the evening of the 21st of October, 1874, when it was quite dark, the plaintiff was on the barges preparing for his night's duty, which would not commence for some hours, when he was told that the defendant's manager, Barker, wanted him at the office, which was in the street at the other side of the warehouse, and to which he was in the habit of going to receive orders. There were two ways of going to the office from the river side, viz. by passing by means of a wherry to stairs at the river end of College Street, or by stepping from the barges into a door-way and thence through the warehouse to the street; the latter being the way which the plaintiff usually adopted. In passing from the warehouse into the street on the occasion in question, the plaintiff was knocked down by a sack of peas which was being hoisted from a waggon by means of a crane to one of the upper floors of the warehouse, the rope by which the sack was being hauled up having through the carelessness of the defendant's men who were performing the work been left too slack.

Upon this state of facts, it was insisted on the part of the defendant, that, inasmuch as the injury complained of was the result of carelessness on the part of persons engaged with the plaintiff in one common employment, the master was not responsible.

The learned judge, yielding to the objection, directed a verdict to be entered for the defendant, with leave to the plaintiff to move to enter a verdict for him for 150*l.*, agreed damages, if the Court should be of opinion that the objection was untenable.

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J. Brown, Q.C., and *W. G. Harrison*, shewed cause against a motion for judgment pursuant to the leave reserved. The relative position of the plaintiff with the other persons in the defendant's employ was such as to bring this case within the rule laid down by Blackburn, J., in *Howells* v. *Landore Siemens Steel Co.* (1), where that learned judge says: "It is a rule of law that the master who employs a servant (not an agent), is responsible for the negligence of that servant in matters in which he is employed: but there is this exception, which has been established by a series of decisions, that, with regard to a fellow-servant, the master is held not so responsible, because this negligence is to be taken as one of the ordinary risks which the servant contemplates and undertakes when entering his employment." Some of the more important decisions upon this subject are *Wilson* v. *Merry* (2), *Bartonshill Coal Co.* v. *Reid* (3), *Waller* v. *South Eastern Ry. Co.* (4), *Morgan* v. *Vale of Neath Ry. Co.* (5), and *Tunney* v. *Midland Ry. Co.* (6) In *Bartonshill Coal Co.* v. *Reid* (3), Lord Cranworth, after speaking of the liability of a master for an injury done to a third person by the negligence of his servant, thus proceeds (7): "But, do the same principles apply to the case of a workman injured by the want of care of a fellow-workman engaged together in the same work? I think not. When a workman contracts to do work of any particular sort, he knows, or ought to know, to what risks he is exposing himself: he knows, if such be the nature of the risk, that want of care on the part of a fellow-workman may be injurious or fatal to him, and that against such want of care his employer cannot by possibility protect him. If such want of care should occur, and evil is the result, he cannot say that he does not know whether the master or the servant was to blame. He knows that the blame was wholly that of the servant. He cannot say that the master need not have engaged in the work at all, for he was party to its being undertaken. Principle, therefore, seems to me opposed to the doctrine that the responsibility of a master for the ill consequences of his servant's carelessness is

(1) Law Rep. 10 Q. B. 62.
(2) Law Rep. 1 H. L., Sc. 326.
(3) 3 Macq. 266.
(4) 2 H. & C. 102; 32 L. J. (Ex.) 205.
(5) Law Rep. 1 Q. B. 149.
(6) Law Rep. 1 C. P. 291.
(7) 3 Macq. at p. 284.

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applicable to the demand made by a fellow-workman in respect of evil resulting from the carelessness of a fellow-workman when engaged in a common work." He then refers to *Priestley* v. *Fowler* (1) and other cases as supporting this view. To bring a case within the exception, it is not necessary that the person doing the injury and the person receiving it should be both engaged in the same identical part of the employer's business, so as to be technically described as "fellow-workmen:" it is enough if both are acting in furtherance of the general concern carried on by the master, though in different capacities. Thus, in *Waller* v. *South Eastern Ry. Co.* (2), where injury was occasioned to the guard of a train by the negligence of the ganger of the plate-layers in keeping the permanent way in proper repair, Pollock, C.B., said (3): "The question resolves itself into this: whether the servant whose negligence caused the accident and the servant who was killed were at the time engaged in what may be called one common object. I think that the superintending the trains on their journey, and the taking care that the rails on which the carriages run are firmly and securely fastened and bolted, constitute one common object, viz. that the passengers shall be conveyed in carriages which are safe and on rails which are free from danger."

[BRETT, J. Was there any community of employment in these two men, the man who received the sack of peas on his head, and the man whose negligence caused it to strike him? The plaintiff's work was confined to mooring and unmooring the barges at certain stated times. He had nothing to do with the warehouse: he did not even assist in loading or unloading the barges.]

Both were engaged, though in different capacities, in the common business of their master. In *Morgan* v. *Vale of Neath Ry. Co.* (4), the plaintiff was in the employment of a railway company as a carpenter, to do any carpenter's work for the general purposes of the company. He was standing on a scaffolding at work on a shed close to the line of railway, and some porters in the service of the company carelessly shifted an engine on a turn-table so that it struck a ladder supporting the scaffold, by

(1) 3 M. & W. 1.
(2) 2 H. & C. 102; 32 L. J. (Ex.) 205.
(3) 2 H. & C. at p. 110.
(4) Law Rep. 1 Q. B. 149.

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which means the plaintiff was thrown down and injured: and it was held that the company were not liable. Erle, C.J., adopts the principle laid down by Blackburn and Mellor, JJ., in the Court below (1) to this effect (2): "There are many cases where the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, and yet the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which are to be considered in his wages. I think that whenever the employment is such as necessarily to bring the person accepting it into contact with the traffic of the line of a railway, risk of injury from the carelessness of those managing that traffic is one of the risks necessarily and naturally incident to such an employment, and within the rule."

[ARCHIBALD, J. The principle of the exception in question seems to be this, that, in the contract of service for wages, the servant accepts all the ordinary risks incident to the service.]

That is precisely the principle which is laid down by Erle, C.J., in *Tunney* v. *Midland Ry. Co.* (3): "The rule has been settled by a series of cases, beginning with *Priestly* v. *Fowler* (4) and ending with *Morgan* v. *Vale of Neath Ry. Co.* (5), that a servant, when he undertakes to serve a master, undertakes, as between himself and his master, to run all the ordinary risks of the service, including the risk of negligence upon the part of a fellow-servant when he is acting in discharge of his duty as servant of him who is the common master of both."

Harris, in support of the rule. The plaintiff and the person whose negligence caused the injury complained of were not engaged in "a common employment," so as to bring this case within the exception to the general rule which makes a master responsible for the negligent acts of his servants. The evidence shewed that the duties of the two were totally unconnected with each other. The plaintiff's duties were confined to the shifting of the barges on the river side of the warehouse, and that only for a short

(1) 5 B. & S. at p. 580; 33 L. J. (Q.B.) 265.
(2) Law Rep. 1 Q. B. at p. 154.
(3) Law Rep. 1 C. P. at p. 296.
(4) 3 M. & W. 1.
(5) Law Rep. 1 Q. B. 149.

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period at and before and after high-water. He never worked in the warehouse.

[BRETT, J. Part of his business was, to go to the office for orders or when sent for by the manager; and for this purpose he usually went through the warehouse and out at the door at which he met with the injury: and he was on his way to the office on that occasion.]

Assuming that it was in the course of his employment that the plaintiff was going through the warehouse to the office, how could that connect his employment as a lighterman with that of the men engaged in the general business of the warehouse? In *Morgan* v. *Vale of Neath Ry. Co.* (1) and *Tunney* v. *Midland Ry. Co.* (2), the injured parties and the persons to whose negligence the respective injuries were attributable were engaged in the common business of their employers: and all the other cases relied on for the defendant are open to the same answer. It is not, however, merely because two men serve the same master that they can be said to be engaged in one common employment.

BRETT, J. We must take the facts which were proved in this case to be these:—The plaintiff was in the service of the defendant, who carries on the conjoined businesses of a corn-merchant, miller, warehouseman, and wharfinger, upon premises abutting on one side on the river Thames, but which premises did not constitute a wharf in the ordinary sense. The plaintiff's duty was for certain wages to attend for about an hour and a half before and an hour and a half after high-water at each tide, for the purpose of mooring and unmooring the barges which came to the warehouse to be loaded or unloaded. I cannot gather from the evidence that he had anything to do with assisting in the general business of the warehouse or even with the loading or unloading of the barges. But it seems to me that it was proved that the going from the barges to the office for orders was an habitual part of his service, and that the only way to get there (unless by water) was, to go into and through the warehouse and thence to the public street through a door over which was a crane by means of which sacks of flour and grain were loaded and unloaded into and from waggons.

(1) Law Rep. 1 Q. B. 149. (2) Law Rep. 1 C. P. 291.

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It does not appear whether or not he was bound by the terms of his original hiring to go to the office for orders: it is enough to say that it had become his usual course to go there by stepping from the barges and passing through the warehouse. That being so, and an accident having happened to him, by the negligence of other servants in his master's employ, whilst he was so passing through the warehouse to the office, the question is whether he can recover damages for it against his master. Now, I decline to say, because I feel a difficulty in understanding or defining it, what is the precise principle on which the immunity of the master in these cases rests. But I am bound by law and by the authority of decided cases to say that such immunity does exist. If under circumstances substantially similar to those of the present case the Courts have held that the plaintiff cannot recover, it is impossible for me to break from those decisions. Inasmuch, therefore, as I am unable to distinguish from this the cases of *Morgan* v. *Vale of Neath Ry. Co.* (1) and *Tunney* v. *Midland Ry. Co.* (2), I feel obliged, however much I regret it, to decide against the plaintiff upon the present occasion.

ARCHIBALD, J. I must confess I do not feel so much difficulty as my Brother Brett does in deducing from the authorities the principle upon which the immunity of the master from the consequences of the negligent acts of his servants in these cases rests. I think it may be expressed in this way:—When a man enters into the service of a master, he tacitly agrees to take upon himself to bear all ordinary risks which are incident to his employment, and amongst others the possibility of injury happening to him from the negligent acts of his fellow-servants or fellow-workmen. The question is, whether the injury to the plaintiff in this case did not in some sense arise from one of those ordinary risks of the service he was engaged in which must or ought to have been in his contemplation when he entered into it. It appears upon the evidence, that, though it was no part of the plaintiff's duty to assist in the general work of the warehouse, as, for example, in the raising or lowering sacks to or from the upper floors, but that his duty was confined to the care and manage-

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(1) Law Rep. 1 Q. B. 149. (2) Law Rep. 1 C. P. 291.

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ment of the craft coming to the premises, yet it seems to have been also a part of his duty to go to the office for orders, and that in the course of this duty he would have to pass through the warehouse and out into the street by the door at which the process of lifting the sacks from the waggon was carried on, where he would necessarily have to encounter the risk of injury from negligence of others in the same employ,—one of the contemplated risks of the service. This seems to me to bring the present case within the principle laid down in *Priestly* v. *Fowler* (1) and the other cases to which our attention has been drawn, and I think we should do much mischief by over-refining upon it. I entirely agree in the remarks made by Pollock, C.B., in *Morgan* v. *Vale of Neath Ry. Co.* (2) "It appears to me," he says, "that we should be letting in a flood of litigation, were we to decide the present case in favour of the plaintiff. For, if a carpenter's employment is to be distinguished from that of the porters employed by the same company, it will be sought to split up the employés in every large establishment into different departments of service. Although the common object of their employment, however different, is but the furtherance of the business of the master, yet it might be said with truth that no two had a common immediate object. This shews that we must not over-refine, but look at the common object, and not at the common immediate object." I think the evidence here shews that this plaintiff brought himself as clearly within one of the contemplated risks of his service as the plaintiff did in that case. For these reasons, I think that the verdict for the defendant ought to stand.

LINDLEY, J. I am of the same opinion. Looking at the nature of the plaintiff's employment, as stated by himself, it seems that that included the going through the warehouse and out by the door over which the sacks were being hoisted. It is true there was another way of going from the barges to the office, viz. by water; but that was not the way the plaintiff was in the habit of going. Having regard to the rule laid down by numerous authorities, I think the risk in question was one to which the plaintiff tacitly

(1) 3 M. & W. 1. (2) Law Rep. 1 Q. B. at p. 155.

agreed to expose himself when he entered the defendant's service. The only doubt I entertained at the trial was whether the plaintiff was at the time of the accident in the employ of the defendant at all. His duty did not call him to the premises at that time. But he was in the habit of going occasionally to see what he would have to do in the course of the night, and to prepare for it. And, being there, he was called by the manager to the office. The accident therefore happened whilst he was employed about his master's business.

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Rule discharged.

Solicitor for plaintiff: *John Long.*

Solicitors for defendant: *Smith, Fawder, & Low.*

WASHER *v.* ELLIOTT.

Jan. 11.

Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 5—*Jurisdiction of the Mayor's Court under.*

The 5th section of the Debtors Act, 1869, gives power to all Courts, including inferior courts, to make orders and to commit to prison, not only in respect of orders or judgments of inferior courts, but also in respect of those of the superior Courts, to the extent of 50*l.*

Held, that the jurisdiction of the Mayor's Court, London, under the Act, is confined to cases in which the debtor is at the time of the issuing of the summons resident or carrying on business within its limits.

Quære, whether it is not also limited to cases in which that court would have had jurisdiction over the original cause of action.

The power given to inferior courts by the Act to rescind or vary orders, does not enable an inferior court to rescind or vary an order of a superior Court on a judgment of the latter.

THE plaintiff, in December, 1874, recovered a judgment in the Court of Common Pleas against the defendant for 36*l.* 9*s.* 3*d.*, for principal, interest, and costs upon a bill of exchange of which the defendant was the acceptor. The bill was accepted and made payable at 36, Parliament Street, Westminster, where the defendant resided and carried on business. The plaintiff took out a summons under the Debtors Act, 1869, and a judge at chambers made an order upon the defendant for payment of the debt by instalments of 1*l.* per week. Four instalments were duly paid;

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but, default having been made in payment of subsequent instalments, the plaintiff on the 2nd of June last issued a debtor's summons out of the Mayor's Court, London, upon which, notwithstanding the defendant's protest, that court on the 10th of June made a fresh order for payment of 2*l.* a month, the first payment to be made within fourteen days.

The 4th section of the Debtors Act, 1869 (32 & 33 Vict. c. 62), enacts that, "with the exceptions hereinafter mentioned, no person shall after the commencement of this Act be arrested or imprisoned for making default in payment of a sum of money."

Sect. 5 enacts that, "subject to the provisions hereinafter mentioned, and to the prescribed rules, *any court* may commit to prison for a term not exceeding six weeks or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of *that* or any other *competent court:* Provided,

"(1.) That the jurisdiction by this section given of committing a person to prison shall, in the case of any court other than the superior Courts of law and equity, be exercised only subject to the following restrictions, that is to say,

"(*a.*) Be exercised only by a judge or his deputy, and by an order made in open court and shewing on its face the ground on which it is issued:

"(*b.*) Be exercised only as respects a judgment of a superior Court of law or equity where such judgment does not exceed 50*l.*, exclusive of costs:

"(*c.*) Be exercised only as respects a judgment of a county court by a county court judge or his deputy.

"(2.) That such jurisdiction shall only be exercised where it is proved to the satisfaction of the court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same.

"Proof of the means of the person making default may be given in such manner as the court thinks just; and for the purposes of such proof the debtor and any witnesses may be summoned and examined on oath, according to the prescribed rules.

"Any jurisdiction by this section given to the superior Courts may be exercised by a judge sitting in chambers, or otherwise, in the prescribed manner.

"For the purposes of this section any court may direct any debt due from any person in pursuance of any order or judgment *of that or any other competent court* to be paid by instalments, and may from time to time rescind or vary such order."

"This section, so far as it relates to any county court, shall be deemed to be substituted for ss. 98 and 99 of the County Court Act, 1846 (9 & 10 Vict. c. 95), and that Act and the Acts amending the same shall be construed accordingly, and shall extend to orders made by the county court with respect to sums due in pursuance of any order or judgment of any court other than a county court.

"No imprisonment under this section shall operate as a satisfaction or extinguishment of any debt or demand or cause of action, or deprive any person of any right to take out execution against the lands, goods, or chattels of the person imprisoned, in the same manner as if such imprisonment had not taken place."

June 11, 1875. *Channell* obtained a rule nisi for a prohibition to restrain the Mayor's Court from proceeding in the matter, upon an affidavit stating that neither plaintiff nor defendant resided or carried on business within the jurisdiction of that court and that no part of the cause of action arose within the city of London.

Nov. 27. *Noel Paterson* shewed cause. He submitted that the 5th section of the Debtors Act, 1869, gave power to any Court (including the Mayor's Court, London,) to enforce any order or judgment of any other Court, quite irrespective of whether or not the original cause of action arose within its jurisdiction.

Channell, in support of the rule. The power of one Court to make these orders upon a judgment of another Court can only exist where both Courts have original jurisdiction over the subject matter of the action, and where the defendant resides or carries on business within the jurisdiction of the court to which the application is made. The object of the enactment was, to give a more convenient and speedy remedy for obtaining satisfaction of a judg-

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ment from persons residing within the limits of the jurisdiction of the local courts, and not to enlarge the jurisdiction of those courts. The expression "any court" must be read with a reasonable limitation. This case falls precisely within the principle acted upon by this Court in *Simpson* v. *Blues* (1), that the jurisdiction of an inferior court is not to be extended by implication.

Cur. adv. vult.

Jan. 11. The judgment of the Court (Grove, Archibald, and Lindley, JJ.,) was delivered by

ARCHIBALD, J. In this case the plaintiff on the 3rd of December, 1874, recovered judgment in this Court against the defendant for the sum of 36*l.* 9*s.* 3*d.* on a bill of exchange of which the defendant was the acceptor.

The bill was both accepted and made payable at 36, Parliament Street, Westminster, where the defendant then resided and carried on business; and neither the plaintiff nor the defendant resides or carries on business within the city of London.

Shortly after the judgment an order was made by a judge at chambers, upon a summons under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5, for the payment of the judgment debt by instalments of 1*l.* per week. Four of these instalments were paid; but, the defendant having fallen into arrear as to subsequent instalments, a summons was on the 2nd of June, 1875, issued out of the Mayor's Court, London, under the Debtors Act, 1869, to which the defendant appeared by his attorney under protest, and upon which an order was on the 10th of June made for the payment of 2*l.* a month,—the first payment to be made within fourteen days.

Under these circumstances, a rule nisi for a prohibition, to prohibit all further proceedings on the summons and order was obtained by the defendant on the 11th of June last, against which cause was shewn on the 27th of November.

On behalf of the plaintiff it was contended, in shewing cause, that the Debtors Act, 1869, confers on the Mayor's Court jurisdiction to make orders in the terms of s. 5 in respect of all debts not exceeding 50*l.* due in pursuance of judgments of the superior

(1) Law Rep. 7 C. P. 290, 296.

Courts at Westminster, wherever the defendant may at the time be resident or the original cause of action have accrued.

On the other hand, it was argued on behalf of the defendant, that, besides the express limit of amount, the jurisdiction of the Mayor's Court under the Act must be restricted to cases in which it would have had jurisdiction over the original cause of action, or to those cases, at all events, in which the debtor is at the time resident within its jurisdiction.

In this case it is clear upon the facts both that the original cause of action accrued and that the defendant resides beyond the limits of the jurisdiction of the Mayor's Court.

What, then, is the extent of the jurisdiction conferred? The question turns upon the construction of Part I. of the Debtors Act, 1869. The language of the 5th section of that Act, on which the plaintiff relies, is of the most general character:—"Subject to the provisions hereinafter mentioned, and to the prescribed rules, *any Court* may commit to prison for a term not exceeding six weeks or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent Court: Provided (1.) that the jurisdiction by this section given of committing a person to prison shall, in the case of any Court other than the superior Courts of law and equity (*b*), be exercised only as respects a judgment of a superior Court of law or equity where such judgment does not exceed 50*l*., exclusive of costs." And, after imposing certain express restrictions on the exercise of the jurisdiction, it is further enacted as follows:—"For the purposes of this section, *any Court* may direct any debt due from any person in pursuance of any order or judgment of that or any other competent Court to be paid by instalments, and may from time to time rescind or vary such order."

It is clear from this language that the inferior Courts contemplated have power to make orders and to commit to prison, not only in respect of judgments of other inferior courts, but also, under some circumstances, in respect of those of the superior Courts as well.

But, what is the meaning of the expression "competent Court," so far as it applies to inferior courts? and is there any limitation

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besides amount to the jurisdiction of inferior courts under the Act in reference to debts due in pursuance of judgments of the superior Courts?

There is no interpretation in any clause of the Act of the word "Court," or of the expression "competent Court"; but, having regard to the subject-matter of the Act, and to the rule of construction, that words which are general and not express or precise should be restricted to the fitness of the matter (Bac. Maxim, 10), it must be understood with reasonable limitations. It cannot, of course, extend to every inferior tribunal that may be properly described as a Court, though it is certain from the provisions of the Act that it includes county courts and some other inferior courts for the recovery of debts, and amongst them, no doubt, the Mayor's Court of London. But, is the reference to such courts in the general terms employed in the statute intended merely to enable them to act within their local limits in regard to new subjects of jurisdiction? or was it the intention of the legislature to enlarge their jurisdiction by implication, so as to give them power over the personal liberty of debtors not resident or carrying on business within the local limits? If the latter construction were adopted, it would follow that the officers of the Mayor's Court would be impowered to enforce an order for committal in respect of a judgment of one of the superior Courts, by arresting the debtor in any part of the kingdom; but it certainly is in the highest degree improbable,—especially when it is borne in mind that no machinery is provided for the purpose, that the main object of the Act is the abolition of imprisonment for debt, and the exceptional exercise of the power of committal is cautiously guarded by many express provisions,—that the legislature could have intended without express words to enlarge generally the local limits of inferior courts in reference solely to a matter of such importance as the liberty of the subject, whilst leaving them in all other respects wholly unaltered.

It is not reasonable to expect that such a change would be made without particular and precise enactments regulating the exercise of a power so extensive and exceptional, or that it would be left to be implied from mere general words the purpose and object of

which may be answered by attributing to them a natural but more limited meaning.

Means, it is true, are provided by the Mayor's Court of London Procedure Act, 1857 (1), for enforcing, with the aid of the Superior Courts, the judgments, rules, and orders of the Mayor's Court beyond the limits of its jurisdiction, by having the execution re-sealed by the sealer of writs of any of the superior Courts, see s. 48: and, in the case of debts as to which that court has original jurisdiction not exceeding 20*l.* due by an order or judgment of the Mayor's Court, the same Act provides that, upon a summons (which may be served wherever the debtor resides or may be), an order of committal may be made (s. 36), which the officer of the Court is expressly impowered to execute beyond the jurisdiction of the court, wherever the debtor may reside or be; but all these provisions are matter of express and particular enactment confined to the cases specified, and do not comprehend orders of the Mayor's Court in respect of judgments of the superior Courts under the Debtors Act, 1869. Unless, therefore, that Act itself gives the power now claimed, such an order could not be enforced against a person resident beyond the jurisdiction.

As regards the county courts, there are provisions in the Acts relating to them by which a debtor against whom an order has been properly made in one district may be followed into another; the high bailiff to whom a warrant is directed being empowered (9 & 10 Vict. c. 95, s. 104), to send it for execution to the high bailiff of any other Court within the jurisdiction of which the debtor shall be or be supposed to be. In this, however, there is no confusion whatever of the boundaries of jurisdiction: but no such power is conferred on the officers of the Mayor's Court.

Rules also, it appears, have been made regulating the practice of the county courts under the Debtors Act, 1869, by one of which it is provided that a judgment summons shall not be issued by a county court unless the debtor dwells or carries on business within its district, or unless leave of the Court, under s. 8 of the County Courts Act, 1856 (which, however, has no application to orders on judgments of the superior Courts), has been obtained. There is no similar rule amongst those which have been framed under the

(1) 20 & 21 Vict. c. clvii.

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Act for regulating the practice of the Mayor's Court; and the jurisdiction claimed depends on the language of the Act itself.

In our opinion, it was not the intention of the Act to enlarge the local jurisdiction of inferior courts in the manner contended for. We think that, in order to give a reasonable and consistent construction to the 5th section of the Act, the word "Court," and the expression "competent Court" must be understood to mean a Court acting within the local limits of its existing jurisdiction, and with reference to persons within those limits, against whom therefore a warrant of the Court for committal could be enforced.

As regards a preliminary order for payment by instalments, no doubt, under the power to rescind or vary "such order," inferior courts may rescind or vary their own orders for payment by instalments; but it seems to us an extravagant construction of the Act to hold that by force of the words "any Court" it was intended to enable an inferior court to rescind or, as in this instance, to vary the order of a superior Court on a judgment of the latter, and thus virtually make the inferior court a court of appeal over the superior Court. It would, moreover, obviously be an idle construction to hold that the Mayor's Court, or any other inferior court, could summon a judgment debtor resident beyond its local limits, and, on his non-appearance, make an order for payment which it would be wholly unable to enforce by a committal to prison where the debtor resides or is found: and, if an order of committal under such circumstances be (as we think it is) unauthorized, we are also of opinion that all the preliminary steps leading up to it would be equally beyond the competency of the court, and should be prohibited.

The intention of the Act, it appears to us, in conferring on inferior courts the power of committal and of making orders in respect of judgments of the superior Courts not exceeding 50*l.* was, not to extend their local jurisdiction in any way, but merely to render them, within their proper local limits, auxiliary to the superior Courts, so that, in the case of debtors resident or carrying on business within such limits, resort might be had to the local court wherever such a course might prove more speedy or convenient than an application to one of the superior Courts.

On the whole, therefore, without deciding the question whether

it is necessary, for the purpose of giving the Mayor's Court power to make the order in question, that the original cause of action should have accrued within its jurisdiction, we are satisfied that the Act confers no such power in relation to debtors who do not reside or carry on business within the city of London, and à fortiori where the debtor is not at the time of the summons actually within the limits of jurisdiction, and therefore that all further proceedings upon the summons and order in question should be restrained.

For these reasons, we are of opinion that the rule for a prohibition should be made absolute, and with costs.

Rule absolute.

Solicitor for plaintiff: *S. T. Cooper.*

Solicitor for defendant: *E. W. Owles.*

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Nov. 16.

[REGISTRATION CASES.*]

ASHWORTH, APPELLANT; HOPPER, RESPONDENT.

Parliament—County Vote—Freehold Interest of uncertain Duration—Rent-charge—Power of Sale—Resulting Trust.

12 Q.B.D. 35.
C.P.D. 101-3

By a deed made between three persons described as "trustees," of the one part, and thirty-four other persons described as "beneficiaries," of the other part, a rent-charge in fee of 120*l.* a year, of which the trustees had become possessed under a grant to them, was subdivided by them into fifty-four parts or shares, one of which was purchased and the price of 52*l.* 5*s.* paid by each of the thirty-four beneficiaries; and the trustees covenanted with them respectively to stand seised of an undivided equal fifty-fourth part of the rent of 120*l.* and the powers and remedies for enforcing payment thereof, and the benefit of the covenants contained in the original grant (all thereinafter referred to as "the said rent and premises"), in trust for each of the said beneficiaries, his heirs and assigns absolutely. The remaining twenty shares were retained by the trustees, in trust for themselves, their heirs and assigns, as tenants in common.

The deed also contained a covenant by each of the beneficiaries with the trustees that, if the former should be desirous of selling his share of the rent-charge, it should be first offered to the trustees at a price to be ascertained, in case of dispute, by two arbitrators; and a similar covenant as to the shares of the trustees. Then came a declaration or proviso that the trustees, or the survivor of them, &c., should respectively have "an absolute power of sale over the said rent and premises, exerciseable at their or his discretion, without any further consent on the part of any person:"—

Held, that the power of sale reserved to the trustees did not cut down the freehold interest which was created in the beneficiaries by the earlier part of the deed, inasmuch as it could only be exercised by the trustees for the benefit of the beneficiaries; and, consequently, that the latter had such a freehold interest as would entitle them to be registered as voters for the county.

APPEAL from the revising barrister for the north-eastern division of the county of Lancaster.

John Hopper duly objected to the name of William Ashworth being retained upon the list of voters for the township of Newchurch.

The appellant Ashworth was on the list of claimants, and claimed to be entitled to vote in respect of one fifty-fourth share of a freehold rent-charge of 120*l.* under the following deed:—

* For convenience of reference, all the registration cases for this year are collected here.

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This indenture made the 28th of January, 1875, between Richard Hoyle Hardman, William Mitchell, and John Munn, the younger (hereafter called "the said trustees"), of the one part, and the several persons (other than the said trustees) whose names are subscribed and seals affixed to these presents, and whose descriptions are set forth in the schedule hereto (hereinafter called "the said beneficiaries"), of the other part: Whereas, by an indenture dated the 5th of January, 1875, and made between Richard Siddall of the one part, and the said trustees of the other part, in consideration of the sum of 2820*l.* therein expressed to have been paid to Siddall by the said trustees, All those four plots of land situate at Waterfood, in Rossendale, in the county of Lancaster, formerly part of an estate there called the Miller Barn estate, and also all those messuages or dwelling-houses and other buildings erected upon the said plots of land, and the appurtenances, were granted and conveyed to uses limiting thereout unto the said trustees, their heirs and assigns, the clear yearly rent of 120*l.*, payable by equal half-yearly payments on, &c., together with certain powers and remedies for securing and enforcing payment of the same yearly rent; and, subject to the said rent, powers, and remedies, to the use of Siddall, his heirs and assigns for ever; and in the now reciting indenture are contained divers covenants by Siddall with the said trustees for payment of the said yearly rent, and as to buildings and other matters: And whereas the said trustees have agreed with each of the said beneficiaries for the sale to him of the beneficial interest of and in one undivided equal fifty-fourth part or share of and in the said yearly rent and the securities therefor, at the price of 52*l.* 5*s.*, and upon the terms hereinafter appearing: Now, this indenture witnesseth that, in pursuance of the said agreement, and in consideration of the sum of 52*l.* 5*s.* to the said trustees paid by each of the said beneficiaries on or before the execution of these presents, one such sum being so paid by each of them the said beneficiaries (the receipt whereof the said trustees do hereby acknowledge), they the said trustees do hereby declare and agree to and with the said beneficiaries respectively that they the said trustees, their heirs and assigns, do and shall henceforth stand seised and possessed of one undivided equal fifty-fourth part or share of and

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in the said yearly rent of 120*l.*, and the said powers and remedies for securing and enforcing payment thereof, and the benefit of the covenants by Siddall in the hereinbefore-recited indenture contained (all hereinafter referred to as "the said rent and premises"), In trust for each of the said beneficiaries, his heirs and assigns absolutely: And it is hereby further agreed and declared by and between the said trustees that they the said trustees, their heirs and assigns, do and shall stand seised and possessed of the remaining parts or shares of and in the said rent and premises, in trust for the said trustees, their heirs and assigns, as tenants in common, in equal shares: And each of them the said beneficiaries doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant with the said trustees, their heirs and assigns, that, if at any time the covenanting party, his heirs or assigns, shall be desirous of selling his or their part, share, or interest of and in the said rent and premises, such part or share shall be first offered to the said trustees or the survivors or survivor of them, or other the trustees or trustee for the time being of these presents at a price, to be ascertained, in case of dispute, by two arbitrators or their umpire to be appointed and to act in accordance with the provisions of the Common Law Procedure Act, 1854, or any then subsisting statutory modification thereof: And each of them the said trustees doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant with the others of them, their heirs and assigns, that, if at any time he the said covenanting party, his heirs or assigns, shall be desirious of selling his or their beneficial part, share, or interest of and in the said rent and premises (including the benefit of the covenant lastly hereinbefore contained), such part, share, or interest shall first be offered to the others of the said trustees, or the survivor of them, or other the trustees or trustee for the time being of these presents (other than the trustee so desiring to sell), at a price to be ascertained in case of dispute in manner aforesaid: And it is hereby expressly agreed and declared that the said trustees, or that the survivors or survivor of them, or that the heirs of such survivor, or that other the trustees or trustee for the time being of these presents, shall respectively have an absolute power of sale over the said rent and premises, exerciseable at their or his discretion, without any further

consent on the part of any person; and that the power of appointing a new trustee or trustees of these presents shall be exerciseable by the surviving or continuing trustees or trustee for the time being, or the acting executors or executor, administrator or administrators of the last surviving and continuing trustee, or by the last retiring trustees or trustee; and on any or every such appointment the number of trustees may be either augmented or reduced: . . .

The schedule referred to contained the names and descriptions of thirty-four persons named therein as beneficiaries.

The execution of the above deed by the several parties thereto was duly proved, as also the fact that previous to the 31st of January, 1875, the claimant had received payment of 1*l.* 2*s.* 2*d.*, being the first half-yearly instalment of the one fifty-fourth share of the rent-charge, the claimant's full share of the rent-charge being 2*l.* 4*s.* 4*d.* per annum.

It was contended on behalf of the objector that the covenant by the parties in the deed who are therein called "the beneficiaries," that, "if at any time they should be desirous of selling their respective shares, such shares should first be offered to the persons in the deed styled the trustees, at a price to be ascertained, in case of dispute, by arbitration," and the absolute power of sale vested in the trustees by the deed, "exerciseable at their or his discretion, without any further consent on the part of any person," were inconsistent with the claimant having such freehold interest in the said one fifty-fourth share of the rent-charge as would entitle him to have his name inserted on the list of voters.

The names of thirty other persons whose names were contained in a schedule annexed to the case, were in like manner duly objected to under similar circumstances.

The revising barrister was of opinion that, inasmuch as the estate of the beneficiaries might be determined at the will of the trustees, the beneficiaries had not such an interest in the rent-charge as entitled them to vote. He therefore expunged the names of William Ashworth and the thirty other persons from the list.

If the Court should be of opinion that his decision was wrong, the register was to be amended by restoring them.

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Gorst, Q.C., for the appellant. The claim to be registered here is under s. 74 of the Registration Act, 6 Vict. c. 18, which enacts that the cestui que trust in actual possession or in the receipt of the rents and profits, and not the trustee, shall vote.

[LORD COLERIDGE, C.J. The question is, whether the power of sale contained in the deed renders the interest of the beneficiaries a holding so absolutely at the discretion of the trustees as to be inconsistent with a freehold interest in the cestuis que trust.]

The power of sale cannot be exercised by the trustees for their own benefit. It must be exercised subject to the other terms of the deed: and the trustees will stand possessed of the proceeds upon the same terms as the shares sold were held by them: see 23 & 24 Vict. c. 145, ss. 1, 4. The power of the trustees to sell is to be exercised only in respect of the whole "rent and premises," subject to the rights of the beneficiaries. In a note by Serjt. Manning to the case of *Wynne* v. *Wynne* (1), it is said that "any interest in land of uncertain duration (though not expressed to be for life), determinable by matter subsequent which is the subject of human agency (as, where it is determinable at the will of a stranger), constitutes a freehold for life." For this a vast number of authorities more or less applicable are cited. In Sugden on Powers, 8th ed. pp. 452, 453, the learned author says, "It is obvious that every power of appointment is, strictly speaking, a power of revocation to the extent of its operation: but still there is a striking distinction between estates actually limited in a settlement with a power of revocation, and estates limited in default of the exercise of a preceding power of appointment. In the first case, the estates are vested, subject to be revoked or defeated by the exercise of the power. Whether in the latter case the estates limited in default of appointment are, during the continuance of the power, contingent or vested, has been the subject of much discussion." And, after referring to many authorities, he concludes: "The result of the authorities therefore is, that the power of appointment does not prevent the vesting of the estates limited in default of appointment." The stat. 8 Hen. 6, c. 7, gives the franchise to those who are in possession of a freehold estate, independently of the circumstances under which the estate may be defeated. In

(1) 2 M. & G. 19, n. (*a*).

another learned note by Serjt. Manning to the case of *Davis* v. *Waddington* (1), it is said: "This judgment of affirmance in effect asserts that the terms of the letters patent" (for the incorporation of a charitable foundation) "confer an absolute power on the governors to remove at pleasure, and that such a power is inconsistent with the existence of a freehold interest in the appointee. As to the latter of these propositions, see the long and unbroken series of decisions collected ante, vol. ii, p. 19, nearly all of which appear to be tacitly overruled by the judgment in the principal case. Lord Coke says (2), 'If a man grant an estate to a woman dum sola fuerit, or durante viduitate, or quamdiu se bene gesserit, or to a man and woman during the coverture, or so long as the grantee dwell in such a house' (though the power of living there may depend upon the will of a third party or even of the grantor) 'or so long as he pay 10*l*., &c., or until the grantee be promoted to a benefice, or for any like uncertain time; in all these cases, if it be of lands or tenements, the lessee has, in judgment of law, an estate for life, determinable, if livery be made; and, if it be rents, advowsons, or any other things that lie in grant, he has a like estate for life by the delivery of the deed; and in pleading he shall allege the lease, and conclude that by force thereof he was seised generally for the term of his life.' . . . Lord Coke says that the law is the same as to the declaration of a use, with respect to the quantity of estate which passes; in confirmation of which Mr. Hargrave cites from Lord Hale's MSS. a dictum of Shelly, J., in 21 Hen. 8, 5 (which was before the Statute of Uses, and when therefore uses stood nearly upon the same footing as trusts at the present time): Co. Litt. 42 a, n. (10)."

J. Edwards, Q.C., for the respondent. The intention of this deed manifestly was to manufacture a number of votes in such a way as to have them under complete control.

[ARCHIBALD, J. We cannot look beyond the legal construction of the deed.]

The deed gives the trustees an absolute power at their own discretion to sell "the said rent and premises." Assume that that means the whole rent and premises, they would be guilty of no breach of trust if they proceeded to sell one half of it.

(1) 7 M. & G. 45, n. (*a*).

(2) Co. Litt. 42. a.

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[LORD COLERIDGE, C.J. My present impression is that the power given is to sell the whole or any part of the said rent and premises.

ARCHIBALD, J. The way a Court of equity would construe the deed would be, I apprehend, that the power is to be exercised beneficially for the beneficiaries.]

The statute 23 & 24 Vict. c. 145 only applies where it is clear that there is a resulting trust: as to which see *Burgess* v. *Wheate* (1), Lewin on Trusts, 6th ed. 126. In substance, this deed gives an absolute power of sale to the trustees discharged from all trusts as to the shares of the beneficiaries: see *Heelis* v. *Blain.* (2) It has never yet been suggested that a fee-simple determinable at the absolute and uncontrolled will of the grantor conferred the franchise.

[ARCHIBALD, J. Has the contrary ever been decided?]

Indirectly, it has. In Rogers on Elections, 10th ed. p. 12, speaking of freehold interests, it is said: "Thus far we have dealt principally with the *tenure* of the land or tenement in which the qualifying estate consists. It will now be necessary to consider more particularly the *nature of the interest* in such lands, &c., which the holder must possess to entitle him to the franchise. That must be, in all the classes above enumerated, of that uncertain or undetermined duration which the law, using the term in a different sense from that before applied to the nature of the land, calls *freehold*, that is to say, an interest extending, or which may extend, during the life of the holder himself or of some other person, and excluding any fixed term of years, however long. Where the language of the instrument creating the estate does not fix any such term certain for its duration, or render it determinable upon any other circumstances than the will of the holder, the estate is considered to be one of freehold interest."

[ARCHIBALD, J. Would not a grant of an estate for life, subject to a power to re-enter, be a freehold interest?]

The cases would seem to go that length: but no case has held that an interest which is determinable at the absolute will of the grantor, would be a freehold interest. In Co. Litt. 42. a., it is said that "a man may have an estate for life determinable at will; as,

(1) 1 Eden, 177, 223. (2) 18 C. B. (N.S.) 90; 34 L. J. (C.P.) 88.

11 Jur. W.S. 18

if the king doth grant an office to one at will, and grant a rent to him for the exercise of his office for term of his life, this is determinable upon the determination of the office." There is a very learned judgment delivered by Serjt. Manning in the South Hants registration Court in 1837 (1), in which the authorities are reviewed.

[LORD COLERIDGE, C.J. In the note to *Davis* v. *Waddington* (2), the learned serjeant says,—"It would appear to make no difference, either in the form or in the substance of the conveyance of the legal estate, if the office or appointment was determinable at the mere will of a third party; as, at the will of a patron, a bishop, or a congregation, or of any other individual or body of men, or even at the mere will of A., the trustee."]

All the cases cited in that note refer to estates for life. In *Beeson* v. *Burton* (3), under a local Act allotments were to be "held respectively by each resident freeman desiring to become the occupier obtaining possession thereof, so long as he shall be willing to hold the same, and shall pay the annual rent and conform to the orders and regulations to be made from time to time" by persons called deputies,—with a power reserved to the deputies to re-enter in case any freeman should be in arrear of rent for his allotment for fourteen days, or should fail to conform to the provisions of the Act or the rules to be made by the deputies: and it was held that each allottee had a freehold estate "of an uncertain duration" in his allotment, which entitled him to vote in the election of members for the borough. In the course of his argument in that case, Hayes, Serjt., sums up the authorities cited in Serjt. Manning's note in 7 M. & G. 45, thus:—"The result of the authorities referred to in that note, is, that, where the interest is determinable at the will of the grantor, it is a mere estate at will; but, where it is made to depend upon the will of the grantee, or the uncertain act of a stranger, the law considers it is an estate for life." In giving judgment, Jervis, C.J., observes (4): "If this is not a freehold, what estate is it? It clearly is not an estate for years: nor is it an estate at the absolute and uncontrolled will of the lessors. It is suggested that it is a sort of

(1) 2 Jur. 459.
(2) 7 M. & G. at p. 49.
(3) 12 C. B. 647; 22 L. J. (C.P.) 33.
(4) 12 C. B. at p. 658.

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parliamentary estate, floating between an estate of freehold and an estate at will. It would manifestly be very inconvenient so to hold; and I do not see how we can consistently with the rules of law hold this to be any other than an estate of freehold." Maule, J. (1), says: "It is well established that an estate which *may* last for a man's life is ordinarily a freehold. An estate for life determinable on an event which is not in the power of the lord from whom it is held, is a freehold. An estate determinable on a condition, which condition cannot arise at the absolute will of the lord, is a freehold. Here, the duration of the estate depends upon the will of the tenant, which will not prevent its being an estate of freehold." And Williams, J., adds: "This is clearly an estate of freehold, inasmuch as it is for an uncertain interest, which may last for the life of the party, and is not confined to the will of the grantors." A man, however, cannot be said to be a "free man," if he is only possessed of an estate of which he may be deprived at the absolute will of another. For this *Davis* v. *Waddington* (2) is a distinct authority. *Ashmore* v. *Lees* (3) and *Steele* v. *Bosworth* (4) are also authorities to shew that the beneficiaries here did not take a freehold interest. Should the Court be of opinion that the estate of the beneficiaries is cut down to an estate for life, this deed does not shew that they had such an amount of interest as to entitle them to be registered; the Reform Act, 2 Wm. 4, c. 45, ss. 18, 19, requires that, in the case of freeholds for life, the person claiming shall be in the actual and bonâ fide occupation of the lands or tenements (freehold or copyhold), or that they shall be of the clear yearly value of not less than 10*l.*

[LORD COLERIDGE, C.J. We have not the materials before us to raise this point. It was matter of fact for the revising barrister. It was evidently not meant to be raised.]

Gorst, Q.C., was heard in reply.

LORD COLERIDGE, C.J. This case comes before the Court upon appeal from the revising barrister, who struck off the names of these persons from the list of voters under these circumstances:—

(1) 12 C. B. at p. 659.
(2) 7 M. & G. 37.
(3) 2 C. B. 31; 15 L. J. (C.P.) 65.
(4) 18 C. B. (N.S.) 22; 34 L. J. (C.P.) 57.

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There was a deed by which, upon one view of it, these persons, who are therein styled "beneficiaries," obtained equitable estates in fee of a value sufficient to give them votes for the county, and which on another view gave them nothing. The question which was discussed before us turns upon the construction of this deed. The deed is expressed to be made between Hardman, Mitchell, and Munn, who are described as trustees, of the one part, and the several persons, of the second part, who are called "the beneficiaries." By an earlier deed which is recited in the deed in question, a rent of 120*l.* a year charged upon certain lands was conveyed by one Richard Siddall to the trustees; and we must take it that this rent-charge was duly vested in the trustees under the Statute of Uses. The trustees, being possessed of this rent-charge of 120*l.* a year, subdivided it into fifty-four parts or shares, thirty-four of which they conveyed to the beneficiaries, retaining the remaining twenty shares in their own hands. The material clauses of the deed are these:—It recites that the trustees have agreed with each of the beneficiaries for the sale to him of the beneficial interest of and in one undivided equal fifty-fourth part or share of and in the said yearly rent and the securities therefor, at the price of 52*l.* 5*s.*, and upon the terms hereinafter appearing: it then goes on to witness that, "in pursuance of the said agreement, and in consideration of the sum of 52*l.* 5*s.* to the said trustees paid by each of the said beneficiaries, one such sum being so paid by each of them the said beneficiaries, they the said trustees do hereby declare and agree to and with the said beneficiaries respectively that they the said trustees, their heirs and assigns, do and shall henceforth stand seised and possessed of one undivided equal fifty-fourth part or share of and in the said yearly rent of 120*l.*, and the said powers and remedies for securing and enforcing payment thereof, and the benefit of the covenants by Siddall in the hereinbefore-recited indenture contained (all hereinafter referred to as 'the said rent and premises'), in trust for each of the said beneficiaries, his heirs and assigns, absolutely." That would undoubtedly be a creation of an equitable fee in each of the beneficiaries: and so far it seems to me that there can be no doubt, upon the decided cases, that, the value being sufficient, each of the beneficiaries would gain a vote. The question is

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whether upon the true construction of the remaining part of the deed the interest thus created in them is so far cut down as to prevent it from being a freehold interest in each of the beneficiaries. The deed goes on, "And it is hereby further agreed and declared by and between the said trustees that they the said trustees, their heirs and assigns, shall stand seised and possessed of the remaining parts or shares of and in the said rent and premises,"—that is, the rent-charge of 120*l.*,—"In trust for the said trustees, their heirs and assigns, as tenants in common, in equal shares." The effect of that is to keep the beneficial interest in the remaining twenty shares in the trustees. Then there is a covenant by each of the beneficiaries with the trustees, that, if at any time the covenanting party, his heirs or assigns, shall be desirous of selling his or their part, share, or interest of and in the said rent and premises, such part or share shall be first offered to the said trustees, &c., at a price to be ascertained, in case of dispute, by two arbitrators, &c. So far, there is nothing to interfere with the absolute vesting of his share in each of the beneficiaries. The deed then goes on to provide that, if any trustee should be desirous of selling his beneficial share or interest in the said rent and premises, it shall first be offered to the others of the trustees at a price to be ascertained, in case of dispute, by arbitration, as in the case of the beneficiaries' shares. Then comes this important clause:—"And it is hereby expressly agreed and declared that the said trustees, or that the survivors or survivor of them, or that the heirs of such survivor, or that other the trustees or trustee for the time being of these presents, shall respectively have an absolute power of sale over the said rent and premises, exerciseable at their or his discretion, without any further consent on the part of any person." Speaking for myself, I construe that power of sale as extending, at the discretion of the trustees, to each fifty-fourth share as well as to the whole "rent and premises." But, for the purpose of the conclusion which we have arrived at, that is not material. If the trustees had not power to sell each individual fifty-fourth, at any rate they have power to sell the whole corpus of the rent-charge without asking the consent of the beneficiaries to the sale. If such power could be treated as a power to be exercised by the trustees for

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their own benefit, so as to enable them to put the proceeds of the sale into their own pockets, then, as at present advised, I think the cases of *Davis* v. *Waddington* (1) and *Beeson* v. *Burton* (2) would apply, and the existence of that power would cut down the estate vested in the beneficiaries by the former part of the deed, and prevent the vesting of a freehold interest in them. But I do not think that that is the true construction of this power. If the trustees sold, I apprehend they could not put the proceeds in their own pockets. They would be obliged, under the provisions of 23 & 24 Vict. c. 145, to apply the money in conformity with the trust, viz. by investing it in other lands subject to the same trusts, or to pay over his proportion to each of the beneficiaries. Although the power of sale is absolute in its language, and there is on the face of the deed no resulting trust in terms, yet it is to be fairly collected from the whole deed that the beneficiaries are not to forfeit the 52*l.* 5*s.* which each of them has paid for his share, but that, if a sale took place, the money realized would have to be paid over to them or invested for their benefit. That seems to me to shew that, until the accruing of the event mentioned in this power,—until the trustees have sold,—there remains in each of the benficiaries a sufficient freehold interest to entitle him to a vote. It may be that the framers of this deed contemplated a fraud upon the election law. It may be that their object was to create votes. They had a perfect right to do so. But, if their object was to retain to the grantors an absolute power to forfeit the rights of the beneficiaries if they should vote in a way which might not be in accordance with the wishes of the grantors, I do not think they have succeeded in attaining that object; and I am satisfied that upon the true construction of the deed they have conveyed to the beneficiaries an estate sufficient to secure to each of them a right to be registered. For these reasons, I am of opinion that the decision of the revising barrister was wrong, and must be reversed.

GROVE, J. I am of the same opinion. Upon the question whether the conveyance of an estate to a man, his heirs and assigns, absolutely, subject to a power of revocation at the will of

(1) 7 M. & G. 37. (2) 12 C. B. 647; 22 L. J. (C.P.) 33.

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the grantor or of a trustee, is a freehold estate or not, it is unnecessary to give any opinion. I am far from saying that such a conveyance would not create an estate of freehold. The case put in Co. Litt. 42. a., and the authorities cited in Serjt. Manning's note to the case of *Davis* v. *Waddington* (1), would seem to shew that it would, notwithstanding it was made subject to a defeasance at the will of the grantor: but it is unnecessary to discuss it here. It is unnecessary also to determine whether the power of sale extended to the whole "rent and premises," or is limited to the shares of the thirty-four beneficiaries, because I am of opinion that, whatever the extent of the power, it was to be exercised only for the benefit of the beneficiaries. In deciding the question before us, we must look at the deed itself and at that only, and see whether it would be a reasonable construction of it to hold that persons, who have given a considerable sum for an estate which is to be held in trust for them, might at the mere will of the trustees be deprived of that which they contracted to purchase. It seems to me that such a construction would be contrary to every principle of equity. In the deed the sellers are called trustees and the buyers beneficiaries, in trust for whom the thirty-four shares are held by the former. Upon such a deed, though it may not be expressed, a Court of equity would infer a resulting trust in favour of the beneficiaries, in the event of the trustees exercising the power of sale. I do not think recourse to the stat. 23 & 24 Vict. c. 145 is at all necessary; but, if it were, I think it would clearly apply to such a case. Upon both grounds, therefore, I am of opinion that these beneficiaries took a freehold interest under the deed, and that the power of sale could only be exercised for their benefit; and consequently their interest was one which under s. 74 of the Registration Act (6 Vict. c. 18) gave them each a vote, the amount having been found by the revising barrister to be sufficient to confer on them the franchise.

ARCHIBALD, J. I am of the same opinion. The question is whether the appellant has such a freehold interest in his fifty-fourth share of this rent-charge as to entitle him to be registered. That turns upon the construction of the indenture of the 28th of

(1) 7 M. & G. 37, 45.

February, 1875, which must be looked at apart from the suggestions which have been made as to the motives of the parties, and as if it was a deed for the carrying out of legitimate family arrangements. So looking at it, it seems to me to have created in the beneficiaries a sufficient equitable freehold interest. I do not think it necessary to say whether or not this case is governed by *Davis* v. *Waddington.* (1) Looking at the whole of the deed, I think the power of sale cannot be construed as Mr. Edwards has suggested. It recites the sale to each of the thirty-four beneficiaries of a share of the rent-charge of 120*l.*, for which each of them has paid 52*l.* 5*s.* And the trustees covenant to stand seised of such share in trust for each of the beneficiaries, his heirs and assigns, absolutely. The deed then goes on to provide that if a beneficiary wishes to part with his interest, he shall first offer it to the trustees at a price to be ascertained in a given way. And then follows a power in the trustees to sell. It would be a strong thing to say that this is a power which could be exercised for the benefit of the trustees themselves apart from the interest of the beneficiaries. If the power were to be exercised at all, it clearly must be exercised for the benefit of the beneficiaries. The result is that each of them has a freehold interest which entitles him to vote. If there could be any doubt as to what the legal operation of the deed is, the stat. 23 & 24 Vict. c. 145, must be taken as if embodied in it. The trustees clearly could not put the proceeds of the sale into their own pockets. And, the interest vested in the beneficiaries by the earlier part of the deed being clearly a freehold interest, the decision of the revising barrister was wrong, and must be reversed.

Decision reversed.

Solicitors for appellant: *Ridsdale, Craddock, & Ridsdale, for Robinson & Sons, Blackburn.*

Solicitors for respondent: *Robinson & Preston, for J. & W. Eastham, Clitheroe.*

(1) 7 M. & G. 37.

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Nov. 16.

WOOD, APPELLANT; HOPPER, RESPONDENT.

Parliament—County Vote—Rent-charge issuing out of two several Estates—8 Hen. 6, c. 7—Frank-tenement.

A person possessed of two several rent-charges in fee issuing out of two several pieces of freehold land in the same county, neither of which rent-charges alone is of the yearly value of 40*s.*, but which together are of the clear yearly value of 40*s.*, has "free tenement" within stat. 8 Hen. 6, c. 7, and is entitled to a county vote.

APPEAL from the revising barrister for the north-eastern division of the county of Lancaster.

John Hopper duly objected to the name of William Wood being retained on the register of voters for the township of Blackburn.

By an indenture, dated the 11th of December, 1857, made between William Ainsworth of the first part, John Kenyon of the second part, and Edward Clark of the third part, a plot of land in Alma Road, Blackburn, was conveyed to uses for securing the payment for ever thereout of the yearly rent-charge of 1*l.* 5*s.*, and, subject thereto, to the use of the said John Kenyon, his heirs and assigns, for ever. By another indenture, dated the 12th of January, 1859, made between the said William Ainsworth of the one part and Thomas Dewhurst of the other part, another plot of land was conveyed to uses for securing the payment for ever thereout of the yearly rent-charge of 1*l.* 3*s.* 7*d.*, and, subject thereto, to the use of the said Thomas Dewhurst, his heirs and assigns, for ever. By an indenture dated the 20th of October, 1869, made between James Stott and Leonard Wilkinson of the first part, Nancy Ainsworth of the second part, Robert Collinson Mellor of the third part, and William Wood of the fourth part, the said yearly rent-charges were conveyed unto and to the use of William Wood, his heirs and assigns, for ever.

It was contended on the part of the objector that Wood was not entitled to have his name retained on the list of voters, inasmuch as neither of the rent-charges was of the value of 40*s.* a year, whilst the language of the statute 8 Hen. 6, c. 7, as to who shall be choosers, says, "whereof every one of them shall have free land or tenement of the value of 40*s.* by the year;" and, a rent-charge

being a tenement, and the word "tenement" being used in the statute in the singular number, it was impossible to add two rent-charges or two tenements together to make up the requisite value; and that a rent-charge was so called because of the power of distress contained in the deed creating the same, and in each of the above cases the power of distress was confined to the particular plot from which the rent-charges issued respectively.

The revising barrister concurred in this view, and expunged the name of Wood.

If the Court should be of opinion that his decision was wrong, the name was to be restored to the list.

Gorst, Q.C., for the appellant. The question is whether the entire rent-charge which constitutes the qualification of the voter must necessarily be charged upon the same land and be secured by a single deed, or whether it is not enough that he has in the aggregate 40*s.* to satisfy the 8 Hen. 6, c. 7, which requires that he should have "free land or tenement to the value of 40*s.* by the year at the least above all charges," or in the original, "ait frank-tenement a le valu de xl *s.* par an al meins outre les reprises." The object of the statute was that the choosers of knights of the shire shall be persons "that may expend forty shillings by the year and above." Here, the voter has "frank-tenement" within the county which yields him 40*s.* a year above all charges; he therefore fulfils all the requirements of the Act, and is entitled to be on the register. The language of Maule, J., in *Gadsby* v. *Barrow* (1), seems to contemplate this very case. The question there arose upon the last clause of s. 20 of 2 Wm. 4, c. 45; and that learned judge said: "It is observable that this section confers the right of voting in respect of the *liability* to pay a certain rent; it is not the *value* of the land, or the *payment* of the rent, which is the criterion; and this is very peculiar. Where the franchise is given in respect of the *value* of the land occupied, the case is very different. There, the right would appear to be intended to be conferred in respect of the value, although made up of several items."

J. Edwards, Q.C., for the respondent. To constitute a good

(1) 7 M. & G. 21, 27.

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qualification under 8 Hen. 6, c. 7, the rent-charge must be one, and must be issuing out of one estate, and not distributed over several. A power of distress is the essence of a rent-charge: Litt. §§ 217, 218; Co. Litt. 143. b. Where that power cannot be exercised, it cannot be a frank-tenement.

[GROVE, J. I cannot see that the power of distress can make any difference.]

The judgment of Tindal, C.J., in *Gadsby* v. *Barrow* (1) is precisely in point. "The question in this case," he says, "turns upon the construction to be put upon the latter part of the 20th section of the 2 Wm. 4, c. 45, which gives for the first time a new right of voting in counties at elections of members of parliament in three different instances. The one now in question, which is the third, depends upon these words,—'who shall occupy, as tenant, any lands or tenements for which he shall be bonâ fide liable to a yearly rent of not less than 50*l.*' The meaning of these words, I think, is, that the tenant is to be liable to a *single* rent of not less than 50*l.* If it had been intended that divers rents might be joined to make up that sum, it would have been easy to use the words 'a yearly rent *or rents* of not less than 50*l.*' The word 'rent' does in point of law denote a redditus for *one* demise."

LORD COLERIDGE, C.J. I am of opinion that the decision of the revising barrister should be reversed. The question is whether a person who has a rent-charge of the value of more than 40*s.* by the year secured upon land is deprived of the privilege of voting given to him by 8 Hen. 6, c. 7, because the rent is not issuing out of a single tenement, and recoverable by one distress. I am of opinion that he is not: and I found my judgment upon the words of the statute. The object of that Act, as its preamble shews, was to reduce the number of electors for knights of shires, and to limit the right of voting: and the enactment is, that the knights "shall be chosen in every county of the realm of England by people dwelling and resident in the same counties, whereof every one of them shall have free land or tenement to the value of 40*s.* by the year at the least above all charges." And the proviso at the end declares "that he which cannot expend 40*s.* by the year

(1) 7 M. & G. 21, 24.

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as afore is said shall in no wise be chooser of the knights for the parliament." The whole scope and tenor of the Act are that the persons who are to vote must have freehold land or tenement of the value mentioned. This person has that qualification, and therefore is entitled to be on the register.

GROVE, J. There is nothing in the words of the statute to warrant the limited construction now sought to be put upon it. The intention was that no person should have a vote unless he was capable of expending 40*s.* a year, a substantial sum in those days, issuing out of free land.

ARCHIBALD, J., concurred.

Decision reversed.

Solicitors for appellant: *Ridsdale, Craddock, & Ridsdale, for Robinson & Sons, Blackburn.*

Solicitors for respondent: *Robinson & Preston, for J. & W. Eastham, Clitheroe.*

HARGREAVES, APPELLANT; HOPPER, RESPONDENT.

Nov. 16.

Parliament—County Vote—"Full Age"—Registration Act (6 *Vict. c.* 18), *s.* 40—*Representation of the People Act* 1867 (30 & 31 *Vict. c.* 102), *s.* 6.

To entitle a voter to be registered in respect of the 12*l.* occupation franchise under s. 6 of the Representation of the People Act, 1867, he must have been of full age on the last day of July in the qualifying year.

APPEAL from the revising barrister for the north-eastern division of the county of Lancaster.

John Hopper duly objected to the name of Joseph Hargreaves being retained in the list of voters for the townships of Coupe Lench, Newhallhey, and Hall Carr.

The name of Hargreaves was inserted in the list in respect of his occupation as tenant of a house and shop of the rateable value of 12*l.* or upwards.

Hargreaves had occupied the shop for two years or thereabouts, but he only attained the age of twenty-one after the expiration of the qualifying year, viz. on the 16th of September, 1875.

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It was contended on behalf of Hopper that Hargreaves was not entitled to have his name retained in the list, under s. 6 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), because he had not, as a person of full age, occupied the premises during the whole or any part of the qualifying year.

The revising barrister concurred in this view, and struck the name of Hargreaves from the list.

If the Court should be of opinion that his decision was wrong, the register was to be amended by restoring the name of Hargreaves.

Gorst, Q.C., for the appellant. The question is whether a person who was an infant on the last day of July in the qualifying year, but had attained his full age at the time of the revision, was entitled to have his name placed on the register of voters. This depends upon the construction of two sections of two Acts of Parliament, viz. s. 40 of the Registration Act, 6 Vict. c. 18, and s. 6 of the Representation of the People Act, 1867, 30 & 31 Vict. c. 102. Sect. 40 of the first Act enacts that, "where the name of any person inserted in any list of voters shall have been objected to, the barrister shall require it to be proved that the person so objected to was entitled on the last day of July then next preceding to have his name inserted in the list of voters in respect of the qualification described in such list; and, in case the same shall not be proved to the satisfaction of such barrister, or in case it shall be proved that such person was then incapacitated by any law or statute from voting in the election of members to serve in Parliament, such barrister shall expunge the name of every such person from the said list." Sect. 6 of the Act of 1867 enacts that "every man shall be entitled to be registered as a voter, and, when registered, to vote for a member or members to serve in Parliament for a county, who is qualified as follows, that is to say,—1. Is of full age, and not subject to any legal incapacity; and, 2. Is on the last day of July in any year, and has during the twelve months immediately preceding been, the occupier, as owner or tenant, of lands or tenements within the county of the rateable value of 12*l.* or upwards." Reading these two provisions together, the plain meaning is, that, though the property qualification must have subsisted during the whole of the

qualifying year, the personal qualification of maturity of age need only exist at the time of registration. In *Powell* v. *Bradley* (1), it was held that, to entitle a person to be registered under 2 Wm. 4, c. 45, s. 27, in respect of the occupation of a house, &c., it is not necessary that he should have been of "full age" during the whole of the prescribed period of occupation. Erle, C.J., in giving judgment, says (2): "The qualification given by 2 Wm. 4, c. 45, s. 27, is, that 'every male person of full age, and not subject to any legal incapacity,' who shall occupy the proper premises, 'shall, if duly registered, be entitled to vote.' Then follows a proviso that no such person shall be so registered, unless he shall have occupied such premises for twelve calendar months next previous to the last day of July. The person entitled to vote must, therefore, be of full age at the time when he claims actually to vote. By the statute 2 Wm. 4, c. 45, s. 27, he must also be of full age at the time when he claims to be put upon the register: but, does that statute require that he must be of full age at the time when the twelve months began to run during which he must have occupied the property which is his qualification? I think that no such thing was intended in the statute; and, though it has the words 'every male person of full age, and not subject to any legal incapacity, who shall occupy, &c., shall, if duly registered, &c., be entitled to vote,' the meaning of that is, 'who *shall have* occupied.' The proviso rather confirms this." And Byles, J., adds: "The contention of the appellant is, in effect, to insert this additional qualification 'occupier, and being of full age during the whole time of such occupation.' There is no necessity for that, in order to give a sensible construction to the Act of Parliament." Coleridge, C.J., seems in *Lord Rendlesham* v. *Haward* (3), to have doubted the correctness of the conclusion which the Court came to in that case. 'The Court," he says (4), "in the case of *Powell* v. *Bradley* (5), have put an interpretation on the word 'then,' holding that it refers to the day of registration, and that the decision of the revising barrister is substituted for what formerly took place in

(1) 18 C. B. (N.S.) 65; Hopw. & P. 159.

(2) Hopw. & P. at p. 161.

(3) Law Rep. 9 C. P. 252; 2 Hopw. & C. 175.

(4) 2 Hopw. & C. at p. 184.

(5) 18 C. B. (N.S.) 65 Hopw. & P. 159.

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the polling-booths. Here, the appellant was by law incapacitated equally on the 31st of July and on the day of the registration; and not the less so because within the twelve months subsequent thereto it was possible that something might occur which would have the effect of removing this incapacity. If the argument addressed to us on this point were correct, it would apply equally in the case of infants, and in many other cases of removeable incapacity, in all of which it might be said that they ought upon similar grounds to be placed on the register." But this was unnecessary for the decision of the question before the Court. If "then" in s. 40 of the Registration Act be referred to the day of registration, full force will be given to both Acts. The revising barrister will see that the property qualification existed on the last day of the qualifying year, and will look at the personal qualification of the party when he comes before him at the registration court.

The respondent did not appear.

LORD COLERIDGE, C.J. I am of opinion that the decision of the revising barrister should be affirmed. The objection taken before the revising barrister was, that the person whose name has been struck off the list was not entitled to be registered, because he was not of full age on the last day of the qualifying year. Now, the words of s. 40 of the Registration Act seem to me to be perfectly clear. That section enacts that, "where the name of any person inserted in any list of voters shall have been objected to,"—here the appellant was objected to,—"the barrister shall require it to be proved that the person so objected to was entitled on the last day of July then next preceding to have his name inserted in the list of voters in respect of the qualification described in such list; and, in case the same shall not be proved to the satisfaction of such barrister, or in case it shall be proved that such person was then incapacited by any law or statute from voting in the election of members to serve in Parliament, such barrister shall expunge the name of every such person from the list." On the 31st of July the appellant was not entitled to have his name inserted in the list, and he was disqualified as a voter. We are pressed with the words of s. 6 of the Representation of the People Act, 1867,—"Every man shall be entitled to be registered as a

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voter, and, when registered, to vote for a member or members to serve in Parliament for a county, who is qualified as follows, that is to say,—1. Is of full age, and not subject to any legal incapacity; and, 2. Is on the last day of July in any year, and has during the twelve months immediately preceding been, the occupier, as owner or tenant, of lands or tenements within the county of the rateable value of 12*l.* or upwards." Now, it seems to me that, in order to give a sensible construction to the second subsection of that clause, "is" must be read "was," seeing that by the provisions of the Registration Acts the lists must be made up several weeks before the revision takes place. If there could be any doubt about that, s. 59 seems to me to put it beyond question. That section enacts, that "this Act, so far as is consistent with the tenor thereof, shall be construed as one with the enactments for the time being in force relating to the representation of the people and with the Registration Acts." Construing s. 40 of the Registration Act with s. 6 of the Representation of the People Act, 1867, it appears to me that, to entitle a person to be registered as a voter in any year, he must on the last day of July in that year be of full age, and must during the twelve months immediately preceding that day have been in the occupation as owner or tenant of lands or tenements of the rateable value of 12*l.* or upwards. We have been much pressed with the decision of this court in *Powell* v. *Bradley*. (1) If that had been a decision upon the point now before us, whatever my own opinion, I should have deferred to it. But the objection there taken was, that, to entitle the person to be registered, he must have been of full age during the whole of the qualifying year. The Act there in question gave the right of voting to "every male person of full age, and not subject to any legal incapacity," and by the proviso no such person was to be registered unless he had occupied the premises in respect of which he claimed to be entitled to vote for twelve calendar months next previous to the last day of July. When the revising barrister had the matter before him, it was proved that the person had occupied during the prescribed period, and that he was of full age on the 31st of July. The decision, therefore, was quite correct. It is true that the Lord Chief Justice goes on in his judgment to say that "the question for the revising barrister

(1) 18 C. B. (N.S.) 65; Hopw. & P. 159.

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is, whether at the time of claim before him to be put upon the register the claimant would, if an election were at that moment being held, be a party qualified to vote according to the proper description." I am unable to assent to that part of the judgment. It was wholly unnecessary for the determination of the question then before the Court; and I do not find that it is concurred in by any other of the learned judges who took part in that decision. I have also been pressed by some language of my own in *Lord Rendlesham* v. *Haward.* (1) That was the first decision which I pronounced in this Court upon the subject; and I fear I followed the example of Erle, C.J., in travelling out of the way to say what might better have been omitted. At all events, if I am supposed there to have assented to anything contrary to my present judgment, I think I was wrong. For these reasons, I think the decision of the revising barrister should be affirmed.

GROVE, J. I must own I entertain strong doubts as to whether or not s. 6 of the Representation of the People Act, 1867, can be read in the manner suggested. I feel great difficulty in departing from the precise words of an Act of Parliament, without some overwhelming necessity for so doing; and more especially so here, inasmuch as in the 3rd and 4th sub-sections of that section the past tense is used. However, I do not desire to express my dissent from the opinions of my Lord and my Brother Archibald.

ARCHIBALD, J. I entirely agree with my Lord. The two Acts being read together, so far as is consistent with the tenor of the Act of 1867, seeing what s. 40 of the Registration Act requires to be proved before the revising barrister, viz. "that the person objected to was entitled on the last day of July then next preceding to have his name inserted in the list of voters in respect of the qualification described in such list," and that his name is to be expunged "in case it shall be proved that he was then incapacitated by any law or statute from voting in the election of members to serve in Parliament," and that s. 6 of the Representation of the People Act, 1867, enacts that every man shall be entitled to be registered as a voter who 1. "is of full age, and not subject to any legal incapacity," and who 2. "is on the last day of July in any year, and has during the twelve months pre-

(1) Hopw. & C. at p. 184.

ceding been the occupier as owner or tenant of lands or tenements within the county of the rateable value of 12*l.* or upwards," the only conclusion I can come to is that subsections 1 and 2 both point to the same time. I therefore think the qualification proved in this case was not sufficient, and that the decision of the revising barrister was correct.

Decision affirmed.

Solicitors for appellant: *Ridsdale, Craddock, & Ridsdale, for Robinson & Sons, Blackburn.*

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Jan. 28.

Railway Company — Agreement to subscribe — "Shareholders" — Companies Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 45), *ss.* 3, 8, 85.

A railway Act, after naming certain persons, of whom the defendant was one, enacted that they and "all other persons and corporations who have already subscribed to or shall hereafter become proprietors in the undertaking, and their executors, &c., shall be and are hereby united into a company for the purpose of making and maintaining the railway," &c. The qualification of a director was to be "the possession in his own right of not less than 30 shares of 10*l.* each;" and it was enacted that the persons named and two persons to be nominated by them were to be the first directors of the company, and were to continue in office until the first ordinary meeting to be held after the passing of the Act, which was to be within nine months, at which meeting a register of shareholders was to be made.

It did not appear whether any shares or scrip were ever issued: but no shares were ever allotted to the defendant, there never was a register of members, no first ordinary meeting of the company nor any general meeting of shareholders was ever held, and no directors were ever appointed otherwise than by the Act itself.

The Companies Clauses Consolidation Act, 1845, enacts in s. 3 that the word "shareholder" shall mean "shareholder, proprietor, or member of the company," and in s. 8 that "every person who shall have subscribed the prescribed sum or upwards to the capital of the company, or shall otherwise have become entitled to a share in the company, *and whose name shall have been entered on the register of shareholders* hereinafter mentioned, shall be deemed a shareholder of the company:"—

Held, that the defendant and the other persons named as the first directors were shareholders within the meaning of the general and the special Act, notwithstanding that no register of shareholders had ever been created, and that the defendant was liable to be proceeded against as such by scire facias.

Affirmed by C. of Appeal (post 664.

SCIRE FACIAS to recover 300*l.* upon a judgment for 321*l.* 16*s.* 6*d.* recovered in an action by the plaintiff against the Didcot, Newbury,

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and Southampton Junction Railway Company. The plaintiff having declared in scire facias, the defendant pleaded "that the plaintiff ought not to have execution against him in respect of the damages in the declaration mentioned, because he said that he was not, at the time of the commencement of the action in which the said judgment was recovered by the plaintiff against the said railway company as in the declaration mentioned, liable thereto as an existing or a former member of the said company." Issue having been joined on that plea, a case was by consent stated for the opinion of the Court. The material facts were as follows:—

The defendant is the William Emmens referred to in s. 4 (1) of the Act as one of the persons who, together with all other persons and corporations who had already subscribed to or should thereafter become proprietors in the undertaking, were thereby united into a company and incorporated by the name of the Didcot, Newbury, and Southampton Junction Railway Company, for the purpose of making and maintaining the railway.

By the 18th section of the Act, the said William Emmens (together with other persons) was to be one of the first directors of the company; and by that section he was appointed as such. By s. 16 (2), the qualification of a director is the possession in his own right of not less than thirty shares of 10*l.* each.

The plaintiff recovered judgment for want of appearance against the Didcot, Newbury, and Southampton Junction Railway Company for 321*l.* 16*s.* 6*d.*, being a sum mentioned in the 11th section of an agreement scheduled to the special Act (3), and costs, but failed to recover any satisfaction from them, and that sum still remained due to him; and, having taken the necessary steps and given the ordinary notices to enable him to have a writ of scire facias issue against the defendant, applied for and obtained a rule for a scire facias to have execution against him as a shareholder in the company, which rule was afterwards made absolute.

A writ of scire facias accordingly issued in pursuance of such rule, and the plaintiff declared in scire facias, and the defendant pleaded thereto, denying that at the time of the commencement of the action in which the judgment was recovered by the plaintiff

(1) See post, p. 208. (2) See post, p. 208.
(3) See post, p. 209.

against the company he was an existing or former member of the company.

No first ordinary meeting of the company has ever been held; nor has any meeting of the directors, or any general meeting of shareholders of the company, ever been held; nor has any register of shareholders ever been prepared; nor did such register ever exist, nor does it now exist; neither has any share nor have any shares ever been allotted to the said William Emmens or to any other person or persons; nor has he ever been a shareholder, unless the statute operates as an allotment or makes him a shareholder; nor has any call ever been paid by him or by any other person. No other directors have ever been appointed besides Mr. Emmens, Mr. Engledue, and Mr. Vigne. (1)

The said William Emmens was one of the petitioners who signed the petition to the House of Commons praying leave to introduce the bill which afterwards passed both Houses of Parliament and became the Didcot, Newbury, and Southampton Junction Railway Act, 1873.

The Court were to be at liberty to draw inferences of fact.

The question for the opinion of the Court was, whether the defendant was or was not liable as a shareholder in the company. If the Court should be of opinion in the affirmative, judgment was to be entered up for the plaintiff for 300*l.* and costs, including the costs of the rule for a scire facias. If the Court should be of a contrary opinion, judgment was to be entered for the defendant, with costs.

W. G. Harrison, for the plaintiff. The defendant having allowed his name to be inserted in the Act of Parliament as a director, the statutory qualification for which office was the possession of thirty shares in the undertaking, it is not competent to him to deny that he is a shareholder. This was decided by Bacon, V.C., in *Kincaid's Case* (2), and by the Master of the Rolls in *Forbes's Case*. (3) The defendant will probably rely upon the absence of a register of shareholders: but he is clearly estopped from setting

(1) The three persons appointed to be the first directors, under s. 18 of the Act. See post, p. 208.

(2) Law Rep. 11 Eq. 192, 196.

(3) Law Rep. 19 Eq. 353, 356.

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up such a defence, seeing that it was by the failure of himself and his co-directors to obey the provisions of the Act of Parliament that no register of shareholders has been made.

R. S. Wright, for the defendant. The question is whether this defendant is a shareholder in the company. Two definitions of "shareholder" are given in the Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16, viz. in the interpretation clause, s. 3, "The word 'shareholder' shall mean shareholder, proprietor, or member of the company," and s. 8, which enacts that "every person who shall have subscribed the prescribed sum or upwards to the capital of the company, or shall otherwise have become entitled to a share in the company, *and whose name shall have been entered on the register of shareholders* hereinafter (s. 9) mentioned, shall be deemed a shareholder of the company." The definition given in that section has been held to be the governing definition: see *Newry and Enniskillen Ry. Co.* v. *Edmunds* (1), where Parke, B., says (2): "By the 8th section of the general Act, all persons who have subscribed to the company, or have otherwise become entitled to a share in it, are to be deemed shareholders, which the interpretation-clause explains to mean 'shareholders, proprietors, or members of the company.' By the 9th section, the company are required to enter in a book to be called 'The Register of Shareholders,' the names of all persons entitled to shares, with the number of shares to which each is entitled, which book is to be authenticated by the seal of the company. By the 28th section, this register is made primâ facie evidence of a party therein named being a shareholder: it is not, however, conclusive, for he may notwithstanding shew that his name has been put there without his consent. By the 27th section, the company, in actions for calls, must prove that the defendant was a shareholder at the time the call was made, that is, a shareholder in the undertaking in the sense of the 8th and 9th sections." That part of s. 8 which requires registration has been always held to be a condition precedent to a party's liability as a shareholder: *Wolverhampton New Waterworks* v. *Hawkesford*. (3) Whether a party may be a share-

(1) 2 Ex. 118; 17 L. J. (Ex.) 102.
(2) 2 Ex. at p. 126.
(3) 6 C. B. (N.S.) 336; 28 L. J. (C.P.) 242; 7 C. B. (N.S.) 795; 11 C. B. (N.S.) 456; 29 L. J. (C.P.) 121; 31 L. J. (C.P.) 184.

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holder without being on the register, was there left an open question. That case was recognised and acted upon in *Irish Peat Co.* v. *Phillips.* (1) In *East Gloucestershire Ry. Co.* v. *Bartholomew* (2) and *Burke* v. *Lechmere* (3) it was assumed that registration was necessary to charge a person as a shareholder.

[GROVE, J. Emmens is named in the special Act as a shareholder and director. Is s. 8 of the Companies Clauses Consolidation Act, 1845, an *exclusive* definition of "shareholder?"]

The mere fact of a man having his name inserted in an Act of Parliament or in articles of association does not of itself make him a shareholder: *Scott* v. *Berkeley* (4); *Brown's Case.* (5) In *New Brunswick and Canada Ry. Co.* v. *Muggeridge* (6), *Yelland's Case* (7) being cited in argument, Willes, J., said: "The question there was whether the petitioner was a contributory. A person may be a contributory, though not a shareholder. When the case came before the Court of Appeal, Lord Cranworth treated the petitioner as not being a shareholder, and expressly said that he was not liable at law." At any rate, it is essential that a register should exist.

Then, assuming the existence of a register and the insertion of the name of the party therein not to be necessary to constitute him a shareholder, is there anything in the special Act to make this defendant a shareholder? The 4th and 16th sections clearly have not that effect. *Hawkesford's Case* (8) is an express authority for that. If a shareholder, of how many shares is he the holder? And the fact of his being described in s. 18 as a director makes no difference. He may resign his directorship: would he in that case be liable for calls, though he never subscribed for a single share, and even though all the shares created had been absorbed by the outside public? In every one of the cases, with the exception of *Newry and Enniskillen Ry. Co.* v. *Edmunds* (9), s. 8 of the

(1) 1 B. & S. 598, 629; 30 L. J. (Q.B.) 363.
(2) Law Rep. 3 Ex. 15.
(3) Law Rep. 6 Q. B. 297.
(4) 3 C. B. 925; 16 L. J. (C.P.) 107.
(5) Law Rep. 9 Ch. 102.
(6) 4 H. & N. 580; 28 L. J. (Ex.) 193, 365.
(7) 5 De G. & S. 395; 21 L. J. (Ch.) 852.
(8) 6 C. B. (N.S.) 336; 28 L. J. (C.P.) 242; 7 C. B. (N.S.) 795; 11 C. B. (N.S.) 456; 29 L. J. (C.P.) 121; 31 L. J. (C.P.) 184.
(9) 2 Ex. 118; 17 L. J. (Ex.) 102.

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Companies Clauses Consolidation Act, 1845, has been held to be the governing section as to the definition of "shareholders." In *Brown's Case* (1), Lord Selborne, C., says that the mere acceptance of the office of director, without more, will not warrant the inference of a contract to become a shareholder. And Lord Justice Mellish adds (2): "In order to constitute any person a shareholder, there must be proof of an agreement between him and the company that he should become a shareholder. I think it is quite clear that the mere fact of being a director cannot by itself make a man a shareholder,—that is to say, make an agreement between the man and the company that he will take shares from the company. The expression that he must be qualified by holding so many shares, does not oblige him to take shares from the company; but he may obtain the shares in any other legal manner by which shares may be acquired; and I think strictly to comply with the articles of association, it would be sufficient that he should have acquired the shares before he acts as a director." There is no difference in principle between the provisions of a special Act and those of articles of association. The decision in *Ness* v. *Angas* (3) proceeded upon the 7 Geo. 4, c. 46, s. 13, which uses the word "members," not "shareholders." Now, "member" includes a person who has agreed to become a member.

Harrison, in reply. Section 8 of the Companies Clauses Consolidation Act, 1845, has reference to the exercise of the rights of the shareholders inter se, and does not profess to be an exclusive definition of the term shareholder. Here, the defendant is by the very terms of ss. 4 and 16 of the special Act constituted a shareholder and director of the company. Section 85 of the general Act expressly enacts that "no person shall be capable of being a director unless he be a shareholder, nor unless he be possessed of the prescribed number, if any, of shares." *Kincaid's Case* (4) and *Forbes's Case* (5) are distinct authorities for holding that a man who promotes an Act of Parliament for the incorporation of a public company, and allows his name to be inserted therein as a

(1) Law Rep. 9 Ch. 105, 107.
(2) At p. 109.
(3) 3 Ex. 805; 18 L. J. (Ex.) 470.
(4) Law Rep. 11 Eq. 192.
(5) Law Rep. 19 Eq. 353.

director, thereby makes a statutory contract with the company to take the number of shares declared by the Act to be necessary to qualify him for the office of director.

GROVE, J. This case has been ably argued; and, as it presents some difficulty, we will consider our judgment.

Cur. adv. vult.

Jan. 28. The judgment of the Court (Grove, Archibald, and Lindley, JJ.), was delivered by

LINDLEY, J. In this case the plaintiff obtained judgment against the Didcot, Newbury, and Southampton Junction Railway Company for 321*l.* 6*s.* 6*d.*, and issued execution against the property and effects of the company. Nulla bona being returned, and the judgment being still unsatisfied, the plaintiff sued out a scire facias against the defendant as the holder of and entitled to thirty unpaid-up shares in the capital of the company. To this scire facias the defendant pleaded that he was not at the time of the commencement of the action against the company liable to the judgment as an existing or former member of the company. On this plea the plaintiff joined issue; and, there being no facts in dispute, a special case was stated for the opinion of the Court. The question submitted to the Court was, whether the defendant is or is not liable as a shareholder in the above company.

This question turns entirely on the true construction of the Act of Parliament creating and incorporating the company, and of the Companies Clauses Consolidation Act, 1845, which is incorporated with it.

The material portions of the company's special Act (36 & 37 Vict. c. ccxxix) are as follows, viz. the preamble, and ss. 2, 4, 6, 14, 15, 16, 18, and 40.

The preamble recites that "the making of the railways thereinafter described would be attended with public and local advantage; and that the persons in this Act named (including the defendant), with others, are willing, at their own expense, to construct the railways, and it is expedient that powers should be conferred on them for that purpose."

Sect. 2 enacts that "The Companies Clauses Consolidation Act,

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1845, Part I (relating to cancellation and surrender of shares) and Part III (relating to debenture stock) of the Companies Clauses Act, 1863, the Lands Clauses Consolidation Acts, 1845, 1860, and 1869, the Railways Clauses Consolidation Act, 1845, and Part I. (relating to construction of a railway) of the Railways Clauses Act, 1863, are (except where expressly varied by this Act) incorporated with and form part of this Act."

Sect. 4. "William Emmens, J. R. Engledue, H. Vigne, and all other persons and corporations who have already subscribed to or shall hereafter become proprietors in the undertaking, and their executors, administrators, successors, and assigns respectively, shall be and are hereby united into a company for the purpose of making and maintaining the railway, and for other the purposes of this Act, and for those purposes shall be and are hereby incorporated by the name of The Didcot, Newbury, and Southampton Junction Railway Company, and by that name shall be a body corporate, with perpetual succession and a common seal, and with power to purchase, take, hold, and dispose of lands and other property for the purposes of this Act."

Sect. 6. "The capital of the company shall be 600,000*l.*, in 60,000 shares of 10*l.* each."

Sect. 14. "The first ordinary meeting of the company shall be held within nine months after the passing of this Act; and the quorum for general meetings, whether ordinary or extraordinary, shall be seven shareholders holding together not less than 20,000*l.* in the capital of the company."

Sect. 15. "The number of the directors shall be five; but the company may from time to time reduce the number, provided that the number be not less than three."

Sect. 16. "The qualification of a director shall be the possession in his own right of not less than thirty shares."

Sect. 18. "William Emmens, J. R. Engledue, H. Vigne, and two persons to be nominated by them or the majority of them, and consenting to such nomination, shall be the first directors of the company, and shall continue in office until the first ordinary meeting held after the passing of this Act. At that meeting the shareholders present in person or by proxy may either continue in office the directors appointed by this Act or nominated as afore-

said, or any of them, or may elect a new body of directors, or directors to supply the place of those not continued in office, the directors appointed by this Act or nominated as aforesaid being, if qualified, eligible for re-election; and at the first ordinary meeting to be held in every year after the first ordinary meeting, the shareholders present in person or by proxy shall (subject to the power hereinbefore contained for reducing the number of directors) elect persons to supply the places of the directors then retiring from office agreeably to the provisions of the Companies Clauses Consolidation Act, 1845, and the several persons elected at any such meeting, being neither removed, nor disqualified, nor having resigned, shall continue to be directors until others are elected in their stead in manner provided by the same Act."

Sect. 40. "The articles of agreement forming the schedule to this Act are hereby confirmed, and shall be valid and effectual to all intents and purposes as between the company and Melville Portal, Esq., and carried into execution accordingly."

The agreement here referred to and confirmed is an agreement between the plaintiff and a gentleman on behalf of the promoters of the company.

It does not appear whether any shares or scrip were ever issued; but the case states that no shares were ever allotted to the defendant, that there never was a register of members, that no first ordinary meeting of the company nor any general meeting of shareholders was ever held, and that no directors were ever appointed otherwise than by the Act itself. Under these circumstances, the first question for consideration is, what was the exact position of the defendant with reference to the company formed by the above Act.

This much we think is clear:—

1. The company was created and incorporated, and became capable (as from the date of the Act) of acquiring rights and incurring debts and obligations:

2. The agreement mentioned in the schedule became binding as between the plaintiff on the one side and the company on the other, and the company became bound to pay the sum of 315*l.* mentioned in clause 11 of the agreement on or before the 1st of December, 1873, whether any shares were issued or not, and

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whether any general meeting of shareholders should be held or not previously to that time:

3. The defendant and the other persons mentioned in s. 4 became by the Act members of the company: See as to this *Cromford and High Peak Ry. Co.* v. *Lacey* (1) and *Scott* v. *Berkeley* (2), where, however, the Court held that the defendant had ceased to be a member before judgment against the company was recovered:

4. The defendant and the other persons mentioned in s. 18 became the first directors of the company:

5. The same persons continued such directors until the first ordinary meeting of shareholders; in other words, they have never ceased to be directors.

The language of ss. 16 and 18 is somewhat obscure, and leaves it doubtful whether the defendant and the other directors named are to be treated as having from the date of the Act thirty shares of 10*l.* a piece, or whether they are to be treated as being only entitled to require and bound to take thirty shares each when the time for allotting shares arrived, if that time should ever come. The expression "if qualified" in s. 18, taken by itself, is as consistent with an absence from the beginning of all qualification as with a qualification held at one time but lost at a later period. But s. 16 must, we think, be taken in connection with s. 85 of the Companies Clauses Consolidation Act, 1845, and, so taking it, we think that the defendant became by the special Act a member of the company in respect of thirty shares of 10*l.* each in the capital of the company, although no shares might be allotted to him, and although the particular shares in respect of which he was constituted a member might not be capable of identification by numbers or otherwise. Unless this be the true construction, the effect of the special Act will be to constitute as first directors of the company men who are made members of the company by the Act, but who have no shares at all in the capital of the company. Moreover, the persons thus constituted directors without having any portion of the capital of the company will be those persons who procured the passing of the Act and expressed their willingness to construct with others at their own expense the railways authorized by the Act. Such a result is so irrational as to compel us to

(1) 3 Y. & J. 80. (2) 3 C. B. 925; 16 L. J. (C.P.) 107.

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reject the construction which leads to it, and to prefer another construction, which is equally warranted by the language of the Act, and leads to no anomalous or irrational result; for, we see nothing anomalous or irrational in treating a person as holding a certain portion of capital although that portion is not capable of identification. Every holder of consols or railway stock is in truth in the same position. It has never yet been decided that no one can be a shareholder except in respect of numbered shares; and the judgment of the Exchequer Chamber in the *Irish Peat Co.* v. *Phillips* (1) is rather against than in favour of such a proposition.

The construction we thus put on the special Act is in entire accordance with the construction put on similar Acts by Bacon, V.C., in *Kincaid's Case* (2), and by the present Master of the Rolls in *Forbes's Case.* (3) The words "if qualified," which occur in s. 18 of the special Act in this case, and which render it difficult to construe, also occurred in *Forbes's Case* (3), and were unsuccessfully relied upon as distinguishing that case from *Kincaid's Case.* (2) It is true that the question in these cases was whether Kincaid and Forbes were contributories, and not whether they were shareholders, which is a totally different matter. But on the true construction of the special Act those cases are quite in point.

Having thus determined the position of the defendant in the company by reason of the language of the special Act, we pass to the remaining question in the case, which is, whether he became a shareholder in the company within the meaning of s. 36 of the Companies Clauses Consolidation Act, 1845. This is the only section which entitles a judgment-creditor of the company to proceed by scire facias against its shareholders; and, unless the defendant is a shareholder within the true meaning of this section, our judgment ought to be for him. We are of opinion, however, that he is such a shareholder.

If the word "shareholder" in s. 36 is interpreted in the sense directed in the general interpretation clause (s. 3), there can be no doubt at all on this point. That section provides that the words and expressions therein specified, both in that and the special Act, shall have the several meanings thereby assigned to them, unless

(1) 1 B. & S. 629; 30 L. J. (Q.B.) 363.

(2) Law Rep. 11 Eq. 193.

(3) Law Rep. 19 Eq. 353.

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there be something in the subject or the context repugnant to such construction; and provides, inter alia, that "the word 'shareholder' shall mean shareholder, proprietor, or member of the company." But it is contended that the sense to be given to the word "shareholder" in s. 36 is that defined in s. 8, and not that in s. 3, and that the defendant is not a shareholder within the meaning of s. 8, and therefore not liable to a scire facias under s. 36. Section 8 is as follows:—"Every person who shall have subscribed the prescribed sum or upwards to the capital of the company, or shall otherwise have become entitled to a share in the company, and whose name shall have been entered on the register of shareholders hereinafter [s. 9] mentioned, shall be deemed a shareholder of the company."

In order to deal with this argument satisfactorily, it is necessary to examine the meaning of the word "shareholder," as used in the Companies Clauses Consolidation Act, 1845. First, it is to be observed that the Act is divided into groups of sections, and s. 3, which is the general definition clause, is amongst the general provisions applicable to the whole Act and all special Acts incorporating it; whilst s. 8 is amongst the group of sections relating to distribution of capital. Secondly, it is to be observed that s. 8 presupposes the existence of a register; and, assuming a register to exist, declares affirmatively who shall be deemed shareholders. But it contains no negative words; and it is obvious from the sections relating to calls,—ss. 21 to 28,—that the object of s. 8 was to facilitate proof of membership by the production of a properly kept register, and not to exclude all proof of membership either where there is no register or where the register has been improperly kept. This was the view taken of s. 8 in *East Gloucestershire Ry. Co.* v. *Bartholomew* (1); and in that view we concur. Indeed, if it were otherwise, it would follow that before shares are allotted and registered no members of a company governed by the Acts in question could be compelled to pay or contribute to its debts.

The true view of the Act we take to be as follows:—1. If a proper register is kept, that register is primâ facie evidence that a person whose name is on it is a shareholder: see s. 28. 2. If, in addition, it be proved that such person has become, by subscribing

(1) Law Rep. 3 Ex. 15.

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to the prescribed sum or otherwise, entitled to a share in the company, the evidence that he is a shareholder is conclusive. 3. If there be no register, or if the register is so defective as to be inadmissible in evidence, other evidence must be adduced to prove that a person is a shareholder. But to exclude all such evidence is not in our opinion required by the Act, and would lead to consequences which are really absurd; for, if this doctrine were to prevail, it would always be in the power of the directors to avoid keeping a register, and thus deprive the creditors of the company of all remedy against the shareholders, or to avoid registering their own shares, and thus secure to themselves perfect immunity from actions for calls as well as from proceedings by scire facias. Nor is it, in our opinion, a sufficient answer to this objection to say that they might be compelled by mandamus to register their shares. The question is, what is the true construction of the statute: and we are of opinion that a construction leading to such results as those above pointed out is to be avoided, unless the language of the statute is so clear that there is no escape from it; and this is by no means the case.

Moreover, it is quite plain that the word "shareholder" in s. 14 of the special Act and s. 66 of the Companies Clauses Consolidation Act is used to denote unregistered members; for, until the first meeting of shareholders, there can be no proper register: see s. 9 of the Companies Clauses Consolidation Act, 1845.

In s. 36 of the Companies Clauses Consolidation Act, 1845, there is nothing to shew whether the word "shareholder" is used in the general sense defined in s. 3, or in the more limited sense defined in s. 8; and, under these circumstances, we think the more general definition as contained in s. 3 ought to be treated as applicable, unless there be good reason for coming to a different conclusion. So to construe the term is simply to do what s. 3 requires and what s. 8 does not forbid.

In this particular case, there is every reason for construing the word "shareholder" in s. 36 in the general sense defined in s. 3, rather than in the restricted sense defined by s. 8; for, as railway companies cannot be wound up, there is no method, unless it be by scire facias against persons in the same position as the defendant, by which the creditors of this company can obtain payment of

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their debts; and it would be a strange conclusion if the true construction of the special Act and general Act were to create a body corporate with a debt of 300*l.*, but having no assets and no members liable to pay that debt. Such, however, must be the result, if the defendant is not a shareholder within the meaning of s. 36 of the Companies Clauses Consolidation Act.

The conclusion at which we have arrived from a careful study of the two Acts is, that the special Act constitutes the defendant a shareholder in respect of thirty shares, within the meaning of s. 36 of the general Act.

We proceed to consider whether we are bound by authority to hold otherwise. It is certainly remarkable that the precise question we have to determine should not be covered by actual decision. Many authorities have been referred to, and we have examined them all; but not one of them is exactly in point.

In *Newry and Enniskillen Ry. Co.* v. *Edmunds* (1), an unregistered purchaser of scrip-certificates was held not liable to calls; but it is plain that he was not a shareholder in any sense. He had acquired a right to become a shareholder; but that was all. In *New Brunswick and Canada Land Co.* v. *Muggeridge* (2), which turned on the Companies Act, 1856 (19 & 20 Vict. c. 47), the defendant had omitted to signify his assent to become a shareholder in the manner required by the constitution of the company, and it was accordingly held that he was not a shareholder. In *Burke* v. *Lechmere* (3), the person proceeded against was on the register, and was rightly put on; and it was assumed that it was necessary that he should be on, in order to be reached by a scire facias. But the defendant there was not a director bound by statute to possess a certain number of shares as a qualification, and the Court had not to consider the effect of the non-registration of a person in the position of the defendant in this case. *Brown's Case* (4) was a decision to the effect that a director who was required by a company's articles of association to possess a certain number of shares as a qualification, and who had obtained them, although not from the company, had done all that was required of him. That case did not turn on any special Act of Parliament

(1) 2 Ex. 118; 17 L. J. (Ex.) 102.
(2) 4 H. & N. 580; 28 L. J. (Ex.) 193, 365.
(3) Law Rep. 6 Q. B. 297.
(4) Law Rep. 9 Ch. 102.

5 Jur. N.S. 1131.

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incorporating the Companies Clauses Consolidation Act, 1845, but on the construction of articles of association coupled with the conduct of the director in question; and there was nothing to shew that Brown had agreed to qualify himself otherwise than as he did. In the present case, the defendant's contention is that he never was qualified at all; and this contention is in our opinion opposed to the terms of the special Act. If in this case the defendant had been duly registered as a holder of thirty shares soon after the Act passed, *Brown's Case* (1) goes far to shew that the requirements of the statute would have been complied with, and that the defendant could not have been treated as a shareholder by virtue of the special Act in respect of any other shares than those duly registered in his name. In other words, in the case now supposed, the undefined shares which the defendant holds by virtue of the special Act would have become defined and identified by the registration of numbered shares in his name. But it by no means follows that, because the shares he holds are not yet defined and identified, therefore he holds none.

The only case which presents any real difficulty is, *Wolverhampton New Waterworks Co.* v. *Hawkesford*. (2) It appears from the special Act, as given in 6 C. B. (N.S.) 344, that the defendant there was a subscriber for 600*l.*; that he and other subscribers were incorporated; that he was named in the statute as one of the first directors; and that his statutory qualification was 100 shares of 5*l.* each. The company sued him, and the declaration in the action contained two counts, one for calls, in the ordinary statutory form, and the other for 600*l.*, being the amount for which he had subscribed. This last count was based on s. 21 of the Companies Clauses Consolidation Act, 1845, and was successfully demurred to on the ground that the defendant was described as a subscriber and not as a shareholder. Nothing material to the present case turns on this point. The count for calls raised the question whether the defendant was liable to be sued in the statutory form for calls made before any specific shares were registered in his name: and the Court held that he was not liable, unless specific shares had been appropriated to him, but expressed an

(1) Law Rep. 9 Ch. 102.

(2) 6 C. B. (N.S.) 336; 28 L. J. (C.P.) 242; 7 C. B. (N.S.) 795; 11 C. B. (N.S.) 456; 29 L. J. (C.P.) 121; 31 L. J. (C.P.) 184.

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opinion that such appropriation might be proved by other means than by a lawfully sealed register. The reason for this decision appears from the following extract from the judgment (1):—"As to the first question, the facts proved must be taken to be, that the company had assented to appropriate 100 shares to the defendant, and that he assented to take them; but no shares had been numbered, and no specific shares had been appropriated. The defendant's name, with others, had been put down on a sheet of paper, and this had been sealed as a register of shareholders; but we have already expressed our opinion that it was not a register, not having any of the essentials required under the Act, and not appearing to have been intended to be a register. Upon these facts, we think that the defendant is not liable to the calls made after January, 1857. He is not shewn to be the holder of any specific share within the meaning of s. 27, giving the action for calls; for, the shares of this company were not created within the meaning of that section, but were in process of formation only. With respect to the calls made after July, 1857, the evidence must be taken to shew that the shares had been numbered and 100 shares so numbered appropriated to the defendant; and a book had been prepared which purported to be a register of shareholders, and was bonâ fide intended so to be, and which contained all essential requisites. But it appeared to have been sealed at a meeting held in July, 1857; and, as the special Act directed the ordinary meetings to be held in January, and as the Companies Clauses Consolidation Act, 1845, authorized ordinary meetings at the time specified in the special Act, and at any other times specified in a resolution come to at a general meeting, the objection of the defendant was that this was no register unless there was a resolution at a January meeting authorizing the meeting in July. In deciding on this objection, we assume that there was no resolution in January authorizing the meeting in July, although, if the point had been more distinctly understood at the trial, the fact might have turned out differently, regard being had to the section (26) defining the proof required from a plaintiff in an action for calls. Thus the question is raised, whether there can be a holder of a share within the 27th section without a register of shareholders authenticated by the seal of the company affixed

(1) 7 C. B. (N.S.) at p. 812, 6 Jur N.S. 635-6

at an ordinary meeting. This question we answer in the affirmative. We consider that all requisites to make a shareholder are complied with except the sealing; so that the question is, whether it is impossible to hold a share unless the name of the holder is in a register of shareholders lawfully sealed. We find no such enactment; and, in respect of transferees, we think they may be holders without this requisite; and although, as above said, the shares must be numbered and specifically appropriated, and this process requires the formation of a book analogous to a register, still it may be done without authentication by sealing at an ordinary meeting. The argument for the defendant rests on s. 8, which describes a shareholder to be, every person who shall have subscribed, &c., or who shall have otherwise become entitled, &c., and whose name shall have been entered on the register of shareholders. This is description rather than definition, as it is clear that a transferee is entitled to a share, and may be a shareholder without his name being on the register of shareholders, if it is on the register of transfers. We think the statute contemplated the process above described of numbering and appropriating, and may well have intended that an inchoate register-book bonâ fide intended to be valid might be taken for this purpose as a register de facto, although not properly sealed; and also that the Act probably intended names to be added from time to time in intervals between the meetings for sealing. There is no decision on the point in respect of an original shareholder; the dictum relating thereto in *Newry and Enniskillen Ry. Co.* v. *Edmunds* (1) is extra-judicial. The principle laid down in *Southampton Dock Co.* v. *Richards* (2), and adopted in *London Grand Junction Ry. Co.* v. *Freeman* (3), that a book bonâ fide intended to be a register, though materially defective, should operate as a register in an action for calls, on account of the inconvenience which would arise if a debtor could defeat the claim upon him by resorting to formal defects in the register of shareholders, supports our decision. For these reasons, we think the defendant is liable to the calls after July, 1857."

All that the Court really decided was, that an action for calls

(1) 2 Ex. 118; 17 L. J. (Ex.) 102. (2) 1 M. & G. 448.
(3) 2 M. & G. 606.

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in the statutory form will not lie against a person who is not proved to be the holder of some specific shares. We do not feel driven by this decision to hold that the defendant in the present case is not liable to be proceeded against by scire facias under s. 36; for, the decision leaves it still open to inquire whether by the provisions of the special Act already noticed the defendant must not be taken to be a proprietor or member of the company within the meaning of s. 3 of the general Act. We think he must; and, if he be proprietor or member, then, as observed in *Kincaid's Case* (1), the qualification prescribed must be the true measure of the extent of such proprietorship or membership: in other words, the defendant must be taken to be a holder of thirty shares of 10*l.* each.

Further, it is to be observed that the language of ss. 26 and 27 of the Companies Clauses Consolidation Act, 1845, on which *Hawkesford's Case* (2) turned, is not the same as the language of s. 36, with which we have here to deal; and the Court, in deciding that case, rested its judgment on the language of the sections relating to the payment of subscriptions and the means of enforcing the payment of calls. It is true that the words "extent of their shares" and "respective shares" occur in this section; but we do not see that the same conditions are necessarily imported into a proceeding under this section as were held in *Hawkesford's Case* (2) to be imposed in the sections relating to actions for calls under s. 26 et seq.

It may well be that, for all purposes of internal management and regulation, e.g. attendance at meetings, voting whether in person or by proxy, making and paying calls, forfeiture of shares, and the like, registration or the allotment of shares numbered and identified may be necessary to constitute a person a shareholder: but it does not at all follow that, because there is no register, there can be no shareholders for the purpose of paying debts which the company through their own instrumentality may have contracted. Be this, however, as it may, we have to construe two Acts of Parliament upon a point not as yet covered by authority;

(1) Law Rep. 11 Eq. 193.

(2) 6 C. B. (N.S.) 336; 7 C. B. (N.S.) 795; 28 L. J. (C.P.) 242; 11 C. B. (N.S.) 456; 29 L. J. (C.P.) 121; 31 L. J. (C.P.) 184. 6 Jur. N.S. 632, 8 W. R. 544.

and it appears to us that, to extend the decision in *Hawkesford's Case* (1) to the case now before us, would be contrary to the true construction of those Acts.

Suppose the special Act in this case had said that the directors named in it (the defendant being one of them) should be respectively deemed to be shareholders to the extent of thirty shares of 10*l.* each, surely they would then have been liable to proceedings under s. 36, notwithstanding the construction put in *Hawkesford's Case* (1) on ss. 26 and 27. Then, the question is, does the special Act fairly construed come to this. For the reasons already given, we think it does, and that *Hawkesford's Case* (1) is not an authority to the contrary. We may further remark that, in *Hawkesford's Case* (1) itself, s. 8 of the Companies Clauses Consolidation Act, 1845, is treated as a description rather than as a definition of a shareholder: see 7 C. B. (N.S.) 814; and we do not understand the case as going the length of deciding that no one could for any purpose be a shareholder within the true meaning of the special Act there in question and the Companies Clauses Consolidation Act, 1845, unless he was on the register. The Court, in fact, seems carefully to have avoided deciding so general a proposition.

The question which we have to consider is, whether a person who by statute is made a member and director of a company, and is required to hold a certain number of shares, and whose duty it was to cause numbered shares to be appropriated to himself, and to cause himself to be registered as a shareholder, and who would plainly be liable to a scire facias if he had performed his duty in these respects, which he has not, can avail himself of his own breach of duty, and successfully contend that he is not a shareholder within the true meaning of s. 36 of the Companies Clauses Consolidation Act, 1845. We are of opinion that he cannot, and our judgment therefore is for the plaintiff.

Judgment for the plaintiff.

Solicitors for plaintiff: *Clarkes, Rawlins, & Clarke.*
Solicitors for defendant: *William Tatham & Sons.*

(1) 6 C. B. (N.S.) 336; 28 L. J. (C.P.) 242; 7 C. B. (N.S.) 795; 11 C. B. (N.S.) 456; 29 L. J. (C.P.) 121; 31 L. J. (C.P.) 184.

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Feb. 18.

PLEVINS *v.* DOWNING.

Sale of Goods—Alteration of Contract, or Arrangement as to Time or Mode of performing it, made by Parol—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 17.

On the 15th of June, 1874, the defendant bought of the plaintiffs 100 tons of pig-iron, to be delivered, "25 tons at once, and 75 tons in July next." By the end of July 75 tons in all had been delivered. There was no evidence of any request by the defendant to the plaintiffs before the end of July to delay the delivery of the last 25 tons; but it was proved that in October the defendant verbally requested the plaintiffs' manager to deliver them, in consequence of which they were forwarded in the course of the same month to the defendant, but he declined to receive them.

In an action against the defendant for refusing to accept the 25 tons, the defendant pleaded, amongst other pleas, that the plaintiffs were not ready and willing to deliver the iron according to the contract:—

Held, that, inasmuch as the vendors were not shewn to have withheld the delivery of the 25 tons in consequence of a request by the vendee before the expiration of the agreed time, viz. in July, the action was not maintainable upon the original contract; and that the subsequent conversation with the vendors' manager could not be relied upon either as a new contract or as an arrangement for an altered time of delivery.

ACTION for non-acceptance of iron pursuant to contract. Plea, amongst others, that the plaintiffs were not ready and willing to deliver the iron according to the terms of the contract. Issue thereon.

The cause was tried before Quain, J., at the last spring assizes at Stafford. The action was founded upon the following bought-note, dated the 15th of June, 1874, and signed by the defendant:—

"Bought of Messrs. Plevins & Co. 100 tons of grey forge pig-iron at 75*s.* per ton, delivered to my works. Payment in cash, less 2½ per cent. discount, on the 10th of each month following delivery. Delivery, 25 tons at once, and 75 tons in July next."

The first 25 tons were delivered immediately, and 50 tons more in July. On the 15th of October, the plaintiffs' manager met the defendant, when the latter said to him,—"You have not sent any pigs lately;" to which the plaintiffs' manager replied, "I will send you a boat this week;" and accordingly the plaintiffs forwarded 25 tons addressed to the defendant, but not at his works;

and the defendant, on being informed by letter that the iron had been dispatched, declined to receive it.

Upon this evidence, the learned judge directed a verdict to be entered for the defendant, with leave to the plaintiffs to move to enter the verdict for them if the Court should be of opinion that there was any evidence of a delivery and acceptance within the contract.

H. Matthews, Q.C., in Easter Term, 1875, obtained a rule nisi.

Powell, Q.C., and *Bosanquet*, shewed cause. To sustain this rule, the plaintiffs must rely upon a new agreement for delivery of the 25 tons in October. What passed between the plaintiffs' manager and the defendant on the 15th of October did not amount to a contract; and, if it did, it was entirely a new contract, which, not being in writing, was not enforceable. Under the original contract, the delivery was to be completed in July, and at the defendant's works. There was clearly no delivery or acceptance under the original contract. In *Marshall* v. *Lynn* (1) it was held that the terms of a written contract for the sale of goods falling within the operation of the Statute of Frauds, cannot be varied ar altered by parol; and that, where a contract for the bargain and sale of goods is made stating a time for the delivery of them, an agreement to substitute another day for that purpose, must, in order to be valid, be also in writing. Parke, B., there says: "Here, there was an original contract in writing to send these goods by the first vessel; an alteration as to the time of their delivery was subsequently made by parol; and the point to be decided is, whether such an alteration by parol of the written contract can be binding. It appears to me that it cannot; and that the same rule must prevail as to the construction of the 17th section of the Statute of Frauds which has already prevailed as to the construction of the 4th section. The decision in *Goss* v. *Lord Nugent* (2), the principle of which I have no doubt is perfectly correct, has clearly established, with respect to the case of a contract relating to the sale of an interest in lands, that, if the original written contract be varied, and a new contract as to any of its terms substituted in

(1) 6 M. & W. 109. (2) 5 B. & Ad. 58.

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the place of it, that new contract cannot be enforced in law, unless it also be in writing." And he treats *Stead* v. *Dawber* (1) as an authority in point. So, in *Stowell* v. *Robinson* (2), it was distinctly held that the day for the completion of the purchase of an interest in land inserted in a written contract cannot be waived by oral agreement, and another day substituted in its place. All that was decided in *Noble* v. *Ward* (3) was, that an invalid agreement for the extension of the time for the delivery of goods under a written contract, did not effect an implied rescission of the original contract. The facts in *Hickman* v. *Haynes* (4) were essentially different from those of the present case. There, the plaintiff voluntarily withheld delivery of the iron at the request of the defendants; here, the parol agreement (if any) to accept the iron was after breach, and therefore could only be relied on as a new contract; and, in giving judgment, the Court expressly says,—"The result of the cases appears to be that neither a plaintiff nor a defendant can at law avail himself of a parol agreement to vary or enlarge the time for performing a contract previously entered into in writing, and required so to be by the Statute of Frauds. . . . In conclusion, we think that, although the plaintiff assented to the defendant's request not to deliver the 25 tons of iron in question in June, he was in truth ready and willing then to deliver them, and that the defendants are at all events estopped from averring the contrary." Here, there was no request on the part of the defendant to forbear to deliver in July, and therefore the plaintiffs cannot recover upon the original contract.

Matthews, Q.C., and *Jelf*, in support of the rule. The only question is whether there was any evidence to go to the jury of an agreement to vary the time of delivery.

[BRETT, J. Are you suing upon the original or upon a substituted contract?]

Upon the original contract. There was evidence that the parties, for their mutual convenience, agreed to substitute one mode of performance for another; and that may be done by parol.

[BRETT, J. Could the plaintiffs on the expiration of the month of July have sued the defendant for not accepting the iron?]

(1) 10 A. & E. 57.
(2) 3 Bing. N. C. 928.
(3) Law Rep. 2 Ex. 135.
(4) Law Rep. 10 C. P. 598.

Undoubtedly he could not.

[BRETT, J. Could the defendant then have sued the plaintiffs for not delivering ?]

In the judgment in *Hickman* v. *Haynes* (1), it is said: "The distinction between a substitution of one agreement for another and a voluntary forbearance to deliver at the request of another, was pointed out and recognised in *Ogle* v. *Lord Vane*. (2) In that case the plaintiff sued the defendant for not delivering iron pursuant to a written contract, and the plaintiff sought to recover as damages the difference between the contract price of the iron and the market price, not at the time of the defendant's breach, but at a later time, the plaintiff having been induced to wait by the defendant, and having waited for his convenience. It was contended that the plaintiff was in fact suing for the breach of a new verbal agreement for delivery at a later date than that fixed by the original agreement: but the Court held otherwise, and that, as the plaintiff had merely forborne to press the defendant, and had not bound himself by any fresh agreement, the plaintiff could sue on the original agreement, and obtain larger damages than he could have obtained if he had not waited to suit the defendant's convenience." A contract about the time of delivery of goods under a written contract, is not within the Statute of Frauds: *Tyers* v. *Rosedale and Ferryhill Iron Co.* (3)

[GROVE, J. That would be overruling *Stead* v. *Dawber* (4), *Noble* v. *Ward* (5), and several other cases.

BRETT, J. In *Tyers* v. *Rosedale and Ferryhill Iron Co.* (3), the second contract was in writing.]

In *Ogle* v. *Lord Vane* (2), the only question was upon what principle the damages were to be assessed.

[BRETT, J. How do you distinguish *Noble* v. *Ward* ? (5)]

As it was distinguished by the Court in *Hickman* v. *Haynes* (6),—it "merely shews that a parol agreement to extend the time for performing a contract in writing, and required so to be by the Statute of Frauds, does not rescind, vary, or in any way affect such written

(1) Law Rep. 10 C. P. at p. 606.
(2) Law Rep. 2 Q. B. 275; in error, Law Rep. 3 Q. B. 272.
(3) Law Rep. 8 Ex. 305; in error, Law Rep. 10 Ex. 195.
(4) 10 A. & E. 57.
(5) Law Rep. 2 Ex. 135.
(6) Law Rep. 10 C. P. at p. 604.

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contract, and cannot in law be substituted for it." There clearly was some evidence to go to the jury. A waiver of the condition as to time may be either by words or by acts and conduct. An assent to the substituted performance of a contract for the transmission of goods in the change of route need not be in writing: *Leather Cloth Co.* v. *Hieronimus.* (1) If there was a new contract, there clearly was evidence of a delivery and acceptance under it which entitled the plaintiffs to sue for the price of goods sold and delivered.

Cur. adv. vult.

Feb. 18. The judgment of the Court (Brett, Grove, and Denman, JJ.,) was delivered by

BRETT, J. In this case, which was tried before Quain, J., at the last spring assizes at Stafford, the action was for non-acceptance of iron. There was a plea that the plaintiffs were not ready and willing to deliver according to the terms of the contract. Upon the issue on this plea the learned judge directed the verdict to be entered for the defendant, with leave to the plaintiffs to move to enter a verdict for them if there was any evidence to go to the jury in support of their claim. A rule nisi having been obtained, the case was argued before us.

The action was founded on the following bought-note:— "Bought of Messrs. Plevins & Co. 100 tons of grey forge pig-iron at 75*s.* per ton, delivered to my works. Payment in cash, less 2½ per cent. discount, on the 10th of each month following delivery. Delivery, 25 tons at once, and 75 tons in July next." Signed by the defendant.

By the end of July the plaintiffs had delivered and the defendant had accepted 75 tons. There was no evidence of any request by the defendant to the plaintiffs, made before the end of July, to withhold delivery of the remaining 25 tons till after the end of July. But there was evidence that in October the defendant verbally requested the plaintiffs to send him the remaining 25 tons, and that the plaintiffs did in October forward 25 tons addressed to the defendant; but the iron did not arrive at the defendant's

(1) Law Rep. 10 Q. B. 140.

works, and the defendant, on being informed by letter of the dispatch of the iron, wrote refusing to accept it.

It was argued for the plaintiffs that they could maintain the action upon the original contract; that they were not driven to rely upon an alteration of it as to the period of delivery, or upon a new contract; that the request of the defendant, acceded to by the plaintiffs, was only an arrangement as to a mode of performing the original contract. It was further argued that, if there was a new contract, there was evidence of a delivery under it which entitled the plaintiffs to sue for the price of goods sold and delivered.

It seems to us, however, that the verdict was rightly directed to be entered for the defendant. It is true that a distinction has been pointed out and recognised between an alteration of the original contract in such cases, and an arrangement as to the mode of performing it. If the parties have attempted to do the first by words only, the Court cannot give effect, in favor of either, to such attempt; if the parties make an arrangement as to the second, though such arrangement be only made by words, it can be enforced. The question is what is the test in such an action as the present, whether the case is within the one rule or the other.

Where the vendor, being ready to deliver within the agreed time, is shewn to have withheld his offer to deliver till after the agreed time in consequence of a request to him to do so made by the vendee before the expiration of the agreed time, and where after the expiration of the agreed time, and within a reasonable time, the vendor proposes to deliver and the vendee refuses to accept, the vendor can recover damages. He can properly aver and prove that he was ready and willing to deliver according to the terms of the original contract. He shews that he was so, but that he did not offer to deliver within the agreed time because he was within such time requested by the vendee not to do so. In such case it is said that the original contract is unaltered, and that the arrangement has reference only to the mode of performing it. But, if the alteration of the period of delivery were made at the request of the vendor, though such request were made during the agreed period for delivery, so that the vendor would be obliged, if

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he sued for a non-acceptance of an offer to deliver after the agreed period, to rely upon the assent of the vendee to his request, he could not aver and prove that he was ready and willing to deliver according to the terms of the original contract. The statement shews that he was not. He would be driven to rely on the assent of the vendee to a substituted time of delivery, that is to say, to an altered contract or a new contract. This he cannot do so as to enforce his claim. This seems to be the result of the cases which are summed up in *Hickman* v. *Haynes*. (1)

In the present case, the plaintiffs cannot prove that they were ready and willing to deliver the disputed iron in July. They cannot say that, being so ready, they withheld an offer to deliver in July at the request of the defendant made in July. The day after the end of July they could not have insisted on an acceptance of iron then offered to the defendant. They attempt to enforce an offer of delivery made in October by means of an alleged request then made by the defendant to forward iron assented to by them.

Inasmuch as they cannot rely upon their readiness and willingness to deliver according to the terms of the original contract, because they were not so ready and willing, they are logically driven to rely upon the subsequent request of the defendant, either as a proposed alteration of a term of the original contract, or as a request upon which to hang a new contract to accept. But, as the request was merely verbal, the undertaking sought to be founded on it cannot be enforced.

As to the suggestion that there was such a delivery and acceptance according to the terms of a new contract as can support an action for goods sold and delivered, we think there was no sufficient evidence of such a delivery and acceptance.

We are therefore of opinion that the rule must be discharged.

Rule discharged.

Solicitor for plaintiffs: *F. T. Dubois.*
Solicitor for defendant: *T. W. Goldring.*

(1) Law Rep. 10 C. P. 598.

WILLIAMS *v.* BOLLAND.

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Feb. 15.

Practice—Removal of a Judgment from an inferior to a superior Court, under 1 & 2 Vict. c. 110, s. 22.

Where a judgment is removed from an inferior to a superior Court under 1 & 2 Vict. c. 110, s. 22, for execution, the superior Court has no jurisdiction to inquire into the merits or into the regularity of the proceedings in the court below.

Post 634-5, 637.

A WRIT of summons issued out of the Passage Court at Liverpool against the defendant upon an attorney's bill, the writ being specially indorsed with a claim for 18*l.* 4*s.* 10*d.* Judgment having been signed for want of a proper appearance, and removed into this Court for execution under 1 & 2 Vict. c. 110, s. 22, Denman, J., on the 8th instant, upon the application of the defendant, made an order setting aside the judgment for alleged irregularity, and upon an affidavit of merits.

W. H. Butler, in pursuance of notice, moved to rescind that order, on the ground that this Court is not a Court of appeal against a judgment of an inferior Court upon a matter of practice, —the remedy for any irregularity being in the inferior Court itself, or, possibly, under s. 45 of the Judicature Act, 1873. He referred to *Sims* v. *Count de Wints* (1), where it was held by Coleridge, J., after time taken to consider, that, where a judgment has been removed from an inferior jurisdiction pursuant to 1 & 2 Vict. c. 110, s. 22, the Court to which it is so removed cannot inquire into the regularity of the proceedings in the court below prior to judgment. In giving judgment, the learned judge said: "It was admitted in the case before me that the judgment on its face was regular, and that the imputed defects could only be got at upon affidavits. I was struck at the time, and am now fully conscious of the great inconvenience of entering into such an inquiry. Are we to determine upon affidavits the limits of the Court's jurisdiction, the rules of its practice, the fact of their being complied with or infringed? If so, on what principle are we to stop short, and not examine by the same unsatisfactory means the merits of the decision? And if by any such inquiry

(1) 8 Dowl. 646.

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we should have satisfied ourselves that there has been a miscarriage in the court below, what is to become of the cause? The judgment is here: are we to remit it? If the blot be in some intermediate stage, is the pleading to go on again below, or is the cause for ever at an end? The section (s. 22) framed with a totally different object in view gives no answer to these objections, and none was suggested at the bar. I think it must be taken that into all irregularities in the course of the proceedings the court below is the proper and exclusive tribunal of inquiry; that, where there is error in the judgment itself, a different recourse may be had in the regular way to the superior Court; but that, when the judgment alone is removed into the superior Court under this section, it is removed for the purpose of execution only; and that we have nothing to do with it but to enforce it."

Bigham attempted to distinguish that case on the ground that here there was an affidavit of merits: and he submitted that the Court would at all events stay the proceedings on the judgment for a reasonable time, to enable the defendant to apply to the Court of Passage for relief.

BRETT, J. When a judgment is removed from an inferior to a superior Court under this statute, it is only for the purpose of enabling the superior Court to execute the judgment. No jurisdiction is given to the superior Court to inquire into the merits or into the regularity of the proceedings in the court below. The case of *Sims* v. *Count de Wints* (1) is precisely in point, and was correctly decided. My Brother Denman, therefore, had no power to make the order in question, and it must be set aside. The appeal before us being successful, according to the ordinary rule the party succeeding is entitled to his costs. The rule will be absolute to set aside the order, with costs; no execution to issue for a fortnight.

ARCHIBALD and LINDLEY, JJ., concurred.

Rule absolute.

Solicitor for plaintiff: *W. Williams.*

Solicitors for defendant: *Chinery & Aldridge, for Maurice Nordon, Liverpool.*

(1) 8 Dowl. 646.

EVANS *v.* WILLS. 1876

March 25.

County Court—Commitment under Debtors Act, 1869 (32 & 33 *Vict. c.* 62) *s.* 5—*Prohibition—Costs.*

Where a debtor has once been committed upon a judgment-summons under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5, for non-payment of a debt, though for a period short of six weeks (the limit imposed by that section), a second warrant of commitment cannot issue against him in respect of the same debt.

Where, however, the order or judgment makes the debt payable by instalments, the debtor may be committed for the full period of six weeks for default in payment of each instalment.

THE defendant was summoned at the suit of the plaintiff to appear at the county court of Herefordshire, holden at Hereford on the 19th of July, 1875, and in his absence judgment passed against him for 4*l.* 10*s.* 9*d.*, debt and costs, which he was ordered to pay forthwith. Default being made, a summons was issued against the defendant under s. 5 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), requiring him to appear before the judge on the 28th of September, 1875. The defendant not appearing, an order was made for his committal to prison for fourteen days; and in November he was arrested under that order and conveyed to Ruthin gaol, where he was detained for the period mentioned in the order of committal.

In January, 1876, the defendant was again summoned to appear before the judge of the same Court on the 25th of that month, on a similar judgment summons for the same debt and costs in addition to some further costs. The defendant was on that occasion represented by a solicitor, who objected that the judge had no power or jurisdiction to commit the defendant a second time for the same default. The judge adjourned the case to the 18th of February, and on that day made an order of committal against the defendant for twenty-eight days, to issue unless the debt and costs were paid within one month.

On the 8th of March the defendant took out a summons calling upon the judge of the county court and the plaintiff to shew cause why a writ of prohibition should not issue to prohibit the county court from further proceeding in and putting in force the order

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for commitment for twenty-eight days made by the judge on the 18th of February, 1876, on the ground that the judge had no power to make such order; and on the summons coming on for hearing before Archibald, J., the learned judge referred the matter to the Court.

Nasmith moved for an order in the terms of the summons. The county court judge had no power to commit twice for the same debt. The whole of the jurisdiction on which the judge assumed to act in this case rests upon s. 5 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), which enacts that, "subject to the provisions hereinafter mentioned, and to the prescribed rules, any Court may commit to prison for a term not exceeding six weeks or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent court." The second proviso is, "that such jurisdiction shall only be exercised where it is proved to the satisfaction of the Court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same." The main scope of the Act is the abolition of imprisonment for debt; it only reserves to the Courts a power to imprison the debtor in certain cases of contumacy or fraud, and it defines the duration of such imprisonment. The 4th section enacts that, "with the exceptions hereinafter mentioned, no person shall be arrested or imprisoned for making default in payment of a sum of money." Then follow certain exceptions which relate to defaults of a quasi criminal character, and the section goes on,— "Provided, first, that no person shall be imprisoned in any case excepted from the operation of this section for a longer period than one year; and, secondly, that nothing in this section shall alter the effect of any judgment or order of any Court for payment of money except as regards the arrest and imprisonment of the person making default in paying such money." So, in the second part of the Act, which relates to the punishment of fraudulent debtors, imprisonment for one year or two years may be inflicted upon a

debtor guilty of the offences mentioned in ss. 12, 13, and 14. But in each case the sentence once pronounced is final; the power once exercised is exhausted: and this is shewn by the last line in s. 23,—"so that he be not twice punished for the same offence." And this view is fortified by the provision in the last clause but one of s. 5, that "no imprisonment under this section shall operate as a satisfaction or extinguishment of any debt or demand or cause of action, or deprive any person of any right to take out execution against the lands, goods, or chattels of the person imprisoned, in the same manner as if such imprisonment had not taken place." It is true that s. 5 contains a provision enabling the Court to direct a debt due from any person in pursuance of any order or judgment of that or any other competent Court, to be paid by instalments, and from time to time to rescind or vary such order; and each instalment would thus become a separate debt in respect of which the debtor might, on default, be committed for forty-two days. But, however hard that may seem, the legislature has so enacted. The ante-penultimate clause of s. 5 provides that "this section, so far as it relates to any county court, shall be deemed to be substituted for ss. 98 and 99 of the County Court Act, 1846 (9 & 10 Vict. c. 95), and that Act and the Acts amending the same shall be construed accordingly, and shall extend to orders made by the county court, with respect to sums due in pursuance of any order or judgment of any Court other than a county court." The 103rd section, which is dependent upon the two sections referred to there, was evidently omitted there by mistake; for, it is re-enacted in the penultimate clause with the omission of these remarkable words,—"or protect the defendant from being anew summoned and imprisoned for any new fraud or default rendering him liable to be imprisoned under this Act." Sect. 103 of 9 & 10 Vict. c. 95, however, is now repealed by the County Courts Act, 1875 (38 & 39 Vict. c. 50), sched. C. This question was raised in a recent case in this Court of *Horsnail* v. *Bruce* (1); and, though not absolutely necessary to the decision of the precise matter before them, two of the judges expressed themselves strongly opposed to the notion that there can be a second commitment for the same default. Bovill, C.J., after observing upon

(1) Law Rep. 8 C. P. 378.

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the several enactments bearing upon the question, says (1): "The result is, that, if there be a liability upon a judgment or order to pay a debt, the neglect to comply with it constitutes one default only, and not a continuing default; and, there being no provisions in the Debtors Act for a continuing default, the omitted words of s. 103 of the Act of 1846 are wholly inapplicable. Sect. 5 of the Debtors Act, 1869, provides that, 'for the purposes of this section, any Court may direct any debt due from any person in pursuance of any order or judgment of that or any other competent Court to be paid by instalments, and may from time to time rescind or vary such order;' and there is a further proviso at the end that 'any person imprisoned under this section shall be discharged out of custody upon a certificate signed in the prescribed manner (2) to the effect that he has satisfied the debt *or instalment of a debt* in respect of which he was imprisoned, together with the prescribed costs, if any.' Under that clause, to my mind, upon each case of default in payment of an instalment, there would be a fresh default and a fresh power of commitment for such default. In substance, the limitation of the power of the county court judge to commit for default in payment of any debt or instalment, is provided for by the first part of s. 5, 'not exceeding six weeks or until payment of the sum due.' If this were not so, this extraordinary and absurd consequence would follow, viz. that a judge of a county court would have a power of repeated commitment for the same default, whereas a judge of a superior Court has no such power. The conclusion I have arrived at is, that s. 5 authorizes one commitment for a period not exceeding six weeks for one default: and that, where the order is for payment of the debt by instalments, the party may in like manner be committed for each default. Here, the judge having made an order for the commitment of the defendant for one default in payment of the whole debt, I am of opinion that he had no jurisdiction to issue a second for the same default, and therefore that the prohibition should go." And Brett, J., says that s. 5 of the Debtors Act, 1869, " in terms applies to one order and one default only." The other two judges, Grove and Honyman, JJ., though they declined to rest their judgments upon this point, did

(1) Law Rep. 8 C. P. at p. 385.

(2) See Form 9, Pollock & Nicol, ed. 1870, p. 843.

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not express any dissent from the view taken by Bovill, C.J., and Brett, J.

E. Pollock, contrà. *Horsnail* v. *Bruce* (1) is clearly distinguishable from the present case. There, the county court judge had committed the debtor for forty days for nonpayment of debt and costs under a judgment. The debtor having been arrested was discharged, after having been in custody for five or six days, by a judge of a superior Court on the ground of privilege, the arrest having taken place whilst he was returning from sessions, where he had been attending as prosecutor and witness. The gaoler claiming to retain the warrant for his own protection, and the judge of the county court refusing to issue a second or duplicate warrant, a fresh judgment-summons was taken out, under which a second order of commitment for forty days for the nonpayment of the same debt and the additional costs was issued. And the Court held that the issuing of the second order of commitment pending the first was an excess of jurisdiction. The observations of Bovill, C.J., and Brett, J., were mere obiter dicta. In the present case, the defendant was committed for fourteen days. After the expiration of the fourteen days, it was proved to the satisfaction of the judge that he was of ability to pay, and he still refused and neglected to pay, and therefore he was guilty of a continuing default, for which he was liable to a fresh commitment: see *Re Boyce*. (2) The commitment here is under process in the nature of *execution*, and not merely process of contempt: *Ex parte Dakins*. (3)

[ARCHIBALD, J. The analogy of the writ of ca. sa. is against you. Once arrested, the debt was gone.]

The warrant here was regular upon the face of it. There is no express provision to prohibit the judge to commit a second time for the continued default, provided the period for which the party is committed does not exceed forty-two days in the whole.

COCKBURN, C.J. It is extremely difficult to understand the principle upon which this legislation proceeds. I can quite understand the legislature altogether doing away with imprison-

(1) Law Rep. 8 C. P. 378. (2) 2 E. & B. 521; 22 L. J. (Q.B.) 393.
(3) 16 C. B. 77; 24 L. J. (C.P.) 131.

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ment for debt as a means of enforcing payment. But, if imprisonment be allowed as a means of obtaining payment, conditioned on the debtor's being able but unwilling to pay, then I do not see why there should be any limit to the duration of the period of imprisonment. If the man has the means of paying, and the object of the imprisonment is to compel him to pay, then it is difficult to discover why that imprisonment should not be coextensive with the contumacy of the debtor. That, however, is not the principle upon which this Act of Parliament proceeds. If it is to be treated as a punishment on the debtor for disobedience of the order of the court, I do not see any power in the Act to enable the county court judge to make a second order of commitment for the same default. He may make an order for the commitment of the debtor for six weeks, or any less period; but, having once done that, he is functus officio. We cannot give the judge a power which the legislature has not conferred upon him. And this is in analogy to the old law. When a man was once arrested on a ca. sa., he could not if let out be imprisoned a second time for the same debt. It is true that where, under this Act, an order is made for payment of the debt by instalments, each instalment becomes a separate debt for default in payment of which a separate order of commitment may be made. This, no doubt, is somewhat anomalous; for the debtor may thus be imprisoned under repeated commitments for a whole year. But there is the enactment, and we must give effect to it. It does not, however, by any means follow that, where the debt is not ordered to be paid by instalments, there can be more than one commitment for the same default. I do not think the Act has given any such power.

ARCHIBALD, J. In construing this Act, we must, I think, be guided by the old law. Under that, the debtor having been once arrested under a ca. sa., he could not be taken again; and, the creditor having taken the highest satisfaction known to the law, his remedy is altogether gone. Bearing that in mind, let us see what this Act of Parliament provides. By its title it professes to be an Act for the abolition of imprisonment for debt, and for

the punishment of fraudulent debtors. Sect. 4 enacts, that, with the exceptions therein mentioned, "no person shall, after the commencement of this Act, be arrested or imprisoned for making default in payment of a sum of money." Then, s. 5 enacts that, "subject to the provisions hereinafter mentioned, and to the prescribed rules, any court may commit to prison for a term not exceeding six weeks or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent court." The question is whether an order of commitment may be made more than once for the same debt. The proviso in s. 5 seems to me only to have altered the law to the extent that is expressed: it gives no authority to commit "from time to time." I do not therefore think the judge had any power in this case to make the second order of commitment. He must exercise the authority given to him once for all. The second proviso in s. 5 imposes (amongst others) this restriction upon the judge's power, viz. that "such jurisdiction shall only be exercised where it is proved to the satisfaction of the court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects to pay the same." And it contains this further enactment, that, "for the purposes of this section, any court may direct any debt due from any person in pursuance of any order or judgment of that or any other competent court to be paid by instalments, and may from time to time rescind or vary such order." Thus, there may be a fresh imprisonment for default in payment of each instalment. Then it is provided that "no imprisonment under this section shall operate as a satisfaction or extinguishment of any debt or demand or cause of action, or deprive any person of any right to take out execution against the lands, goods, or chattels of the person imprisoned, in the same manner as if such imprisonment had not taken place." From that proviso I draw an inference different from that drawn by Mr. Pollock. But for that proviso, the imprisonment would have operated as a satisfaction of the debt, even as against the goods of the debtor. Although the

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observations of Bovill, C.J., and Brett, J., in *Horsnail* v. *Bruce* (1) were not necessary to the decision of the case before them, I entirely concur in the view taken by those learned judges. I think it was not competent to the county court judge to make the second order of commitment in this case, and therefore the prohibition must go.

Nasmith asked for costs. He referred to 1 Wm. 4, c. 21, s. 1, which regulates the proceedings in prohibition, and which contains this provision as to costs, viz. that "the party in whose favor judgment shall be given, whether on nonsuit, verdict, demurrer, or otherwise, shall be entitled to the costs attending the application and subsequent proceedings, and have judgment to recover the same." (2)

COCKBURN, C. J. So far as this is an application to our discretion, we think the case presented fair matter for discussion. The defendant may have costs, exclusive of the costs of the appeal from chambers.

Rule absolute accordingly.

Solicitors for plaintiff: *Saunders, Hawksford, & Bennett, for James Corner, Hereford.*

Solicitor for defendant: *Joseph E. Turner, for A. H. Reid Wrexham.*

(1) Law Rep. 8 C. P. 378.

(2) It has been held that this section does not give costs to the applicant where the rule for a prohibition is made absolute *without pleadings*, there being no "judgment" in that case within the meaning of that enactment: see *Rex* v. *Keeling* (1 Dowl. 440); *Ex parte Overseers of Everton* (Law Rep. 6 C. P. 245).

ELLIS *v.* FLEMING AND ANOTHER. 1876 Jan. 22.

Mayor's Court, London—Prohibition—Abandonment of severable Items—Discretion of the superior Courts.

An action having been brought in the Mayor's Court, London, upon a guarantee given by the defendants for an attorney's bill, upon shewing cause against a rule for a prohibition obtained (before declaration) on the ground that the whole of the plaintiff's cause of action did not arise within the city of London, certain of the charges in the bill being for attendances at Westminster, the plaintiff consenting altogether to abandon his claim in respect of those items,—

The Court discharged the rule, but without costs.

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ACTION in the Mayor's Court, London, to recover 30*l.* 13*s.* 10*d.* upon a guarantee or undertaking in writing signed by the defendants at the office of the plaintiff in the city of London on the 8th of April, 1875, for securing the plaintiff's charges for work to be done by him as solicitor for a company called The Expenditure Redemption Bank, Limited, whose offices were at 61, Moorgate Street, City.

Upon an affidavit of the defendant, that the plaintiff's cause of action, if any, did not wholly arise within the city of London, nor within the jurisdiction of the Mayor's Court, but that a considerable portion of the money for which the action was brought was claimed by the plaintiff in his bill of costs (which had been delivered) to be due to him in respect of work and labour done at various places out of the city of London and out of the jurisdiction of the Mayor's Court, and that neither of the defendants resided or carried on business within the city;

Kingsford, in Michaelmas sittings last, obtained a rule nisi for a prohibition to the Mayor's Court to restrain all further proceedings in the action therein. He stated that no declaration had been delivered.

Sutton shewed cause, upon an affidavit shewing that the undertaking was given by the defendants within the city, and that, with the exception of three or four items for attendances in the city of Westminster, the whole of the business had been done and the moneys disbursed for the company within the city.

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[BRETT, J. The signing of the guarantee gave no cause of action till the work was done. Is the plaintiff content to give up the charges for attendances out of the jurisdiction?]

He will undertake not to proceed for those.

Kingsford, in support of his rule. The plaintiff's claim in the action is for the whole bill. In *Gold* v. *Turner* (1), orders were given for goods at Poplar, to be delivered to a carrier named by the buyer and to be paid by him. The goods were received by the carrier (on delivery orders handed to him by the seller in the city of London) partly within and partly without the city. An action having been brought for the price in the Mayor's Court, it was held by this Court that, as part of the cause of action arose out of the jurisdiction of the Mayor's Court, the defendant was entitled to a prohibition.

[BRETT, J. In *Gold* v. *Turner* (1), the plaintiff was obliged to rely upon the order, which was given outside the city. Here, however, the plaintiff has to prove each item of his bill: there is nothing to prevent him at this stage of the action from abandoning his claim in respect of attendances at Westminster.]

In *Chambers* v. *Green* (2), it was held that, when a writ of prohibition has been issued to restrain proceedings in the Mayor's Court on the application of a stranger to the suit, it cannot be sustained unless he can shew that the Court has exceeded its jurisdiction both with reference to the facts and the law, and then it is a matter of discretion with the superior Court whether or not to set it aside. Sir G. Jessel, M.R., after adverting to a dictum of Cockburn, C.J., in *Re Forster* (3), adopted in the judgment delivered by Willes, J., in *Mayor of London* v. *Cox* (4), and to the recent decision of this Court in *Worthington* v. *Jeffries* (5), says: "Here we have the opinions of three judges against eight, and I elect to follow the opinion of the greater number, which appears to be in accordance with common sense, and lays down the rule that, when both parties to the action wish the inferior Court to decide it, a stranger should not as a matter of course prevent it. I take this view, and hold that it is within the discretion of the

(1) Law Rep. 10 C. P. 149.
(2) Law Rep. 20 Eq. 552.
(3) 4 B. & S. 187, 199; 32 L. J. (Q.B.) 312.
(4) Law Rep. 2 H. L. 239.
(5) Law Rep. 10 C. P. 379.

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superior Court, and in the exercise of that discretion I discharge the writ of prohibition, with costs."

[BRETT, J. All that that amounts to is, that the Master of the Rolls differs from us upon the question of discretion.]

BRETT, J. In this case a rule for a prohibition was moved for to prevent further proceedings in the Mayor's Court, London, on the ground that the whole cause of action did not arise within the jurisdiction of that Court. The action, it seems, was brought upon an undertaking for the payment to an attorney of costs due to him for services rendered to a company in which the defendants were interested. The entire bill might or might not be due to the plaintiff. The greater part of the business, it is conceded, was done within the city of London; but some few items in the bill were for attendances out of the city, viz. at Westminster. The prohibition was moved for before the plaintiff had declared in the inferior court. Upon shewing cause, the plaintiff, by his counsel, expressed his willingness not to continue his action in the Mayor's Court for those portions of his bill which related to work which was done out of the city, and to abandon all claim against the defendants in respect of it, and reduce his claim to those charges which related to work done by him within the city. The question is whether, under these circumstances, we are bound to make the rule absolute for a prohibition. It has been thought by some that this Court has adopted a more rigorous rule in dealing with these matters than other Courts have. It may be that we have been induced, by reason of what may almost be called the rebellious conduct of some attorneys practising in the Mayor's court, to act with some strictness in prohibiting what we conceived to be an improper usurpation of jurisdiction by the inferior court: but we have no desire to set up rules of our own upon the subject contrary to those adopted in the other Courts. The case of *Chambers* v. *Green* (1),—which occurred since our decision in *Worthington* v. *Jeffries* (2),—has been cited for the purpose of shewing that the superior Courts have in all cases a discretion to grant or to refuse a prohibition; whereas we held, in *Worthington* v. *Jeffries* (2), that, when a superior Court is clearly of opinion, both with reference to the facts and the law,

(1) Law Rep. 20 Eq. 552. (2) Law Rep. 10 C. P. 379.

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that an inferior Court is exceeding its jurisdiction, it is bound to grant a writ of prohibition, whether the applicant for the prohibition is the defendant or a stranger, and that in such a case neither the smallness of the claim in the suit below nor delay on the part of the applicant is a reason for refusing the writ. It is true that, in *Chambers* v. *Green* (1), the Master of the Rolls expressed his dissent from that view of ours. But, notwithstanding the respect which we all feel to be due to everything that falls from that eminent judge, I do not think that that dictum at all derogates from the authority of *Worthington* v. *Jeffries*. (2) Acting upon that principle, where the prohibition is asked for before declaration, and the action is brought in respect of a bill of costs, each item of which gives a cause of action, I am by no means clear that, if the plaintiff consents altogether to abandon his claim for all the items which relate to business done out of the jurisdiction of the Mayor's Court, he ought not to be at liberty to do so, and that, in that case, we are not bound to grant a prohibition. I am not prepared to say that, if a verdict had already been taken in the Mayor's Court for the whole claim, this Court would, upon the plaintiff's mere offering to abandon some of the items comprised in it, have allowed him to proceed to execution for the rest: nor do I say that, if the plaintiff was only willing to withdraw the objectionable items when he declared in the Mayor's Court, reserving his right to sue for them in another Court, this Court would have refused to grant a prohibition. But, seeing that the plaintiff is willing unreservedly to abandon so much of his demand as relates to work for which he could not sue in the inferior jurisdiction, I do not feel that we at all contravene the rule laid down in *Worthington* v. *Jeffries* (2) by discharging this rule. When, however, the defendant came here to ask for the rule, it was with reference to the whole bill as it then stood, and it is only by the plaintiff's abandonment of a portion that his right to have the rule made absolute is intercepted: he was therefore quite justfied in coming to the Court, and I think his rule should be discharged without costs.

GROVE, J. I also think the rule for a prohibition should be discharged; and I base my judgment on the facts of this particular

(1) Law Rep. 20 Eq. 552. (2) Law Rep. 10 C. P. 379.

case. If the plaintiff had been suing in the Mayor's Court only for such of the charges contained in his bill as were for business done for the company within the jurisdiction of that court, there would have been no ground for coming to this Court for a prohibition. The question therefore is, whether, when the plaintiff, on shewing cause against a rule for a prohibition obtained before declaration in the inferior court, elects to abandon so much of his claim as is not properly the subject of an action there, he can be allowed to go on with his action for the recovery of the rest of his claim as to which no such objection arises. I am of opinion that he can. This inconvenience would follow from a contrary decision, viz. that the present proceedings in the Mayor's Court would be abandoned, and a fresh action brought there in respect of those items of the bill which relate to business done within the city, with which this Court could not interfere. The only doubt I have felt is, whether the defendant ought not to have the costs of coming here; but, upon the whole, I am not prepared to dissent from the view taken by my Brother Brett.

DENMAN, J. I also am of opinion that this rule should be discharged without costs. The only real question in these cases is whether the inferior court is to be allowed to proceed in a matter over which it has no jurisdiction. Now, when this rule was obtained, it was at least probable that the inferior court was proceeding and would continue to proceed in a matter as to which it was without jurisdiction. There was a material part of the cause of action which was not within its jurisdiction. But now it is plain that the Mayor's Court will be proceeding only in respect of a cause of action over which it has complete control. That being so, there is no ground for a prohibition, and consequently the rule must be discharged. Inasmuch, however, as when the rule was moved for it was highly probable, to say the least, that the plaintiff was proceeding for a cause of action which included matters not within the jurisdiction of the Mayor's Court, I agree with the rest of the Court that there should be no costs.

Rule discharged, without costs.

Solicitors for plaintiff: *C. C. Ellis & Co.*
Solicitor for defendants: *Royle.*

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Feb. 19.

TAYLOR *v.* NICHOLLS.

Mayor's Court, London—Prohibition—Account stated within the City.

The defendant ordered goods of the plaintiff's traveller in Battersea, and they were delivered to him at his place of business in Battersea, where he resided. There was no statement as to the place from which the goods were sent; but, after they had been received by him, the defendant, in answer to a letter written to him by the plaintiff's solicitor in King William Street, City, demanding payment of the price, 8*l.* 8*s.* 6*d.*, wrote to the solicitor (whether by post or otherwise did not appear),—"I will call at your office in the early part of next week, and hope to make some satisfactory arrangement for the payment of Mr. Taylor's claim." Upon a rule for a prohibition to restrain the proceedings in an action brought in the Mayor's Court "for goods sold and delivered at the defendant's request, and upon accounts stated:"—

Held, a sufficient admission of the debt to support an account stated, and to warrant the Court in assuming that there was a cause of action arising within the jurisdiction of the Mayor's court.

An action was brought by the plaintiff against the defendant in the Mayor's court, London, to recover 8*l.* 8*s.* 6*d.* "for goods sold and delivered at the defendant's request, and upon accounts stated."

Channell obtained a rule nisi for a prohibition upon an affidavit of the defendant and a stranger, which stated that "the cause of action arose in the county of Surrey, and not in the city of London, the goods sued for (describing them) having been ordered by the defendant of the plaintiff's traveller at the Lord Auckland public-house, Battersea, in the county of Surrey, and afterwards delivered by the plaintiff to the defendant at his (the defendant's) shop, situate at No. 2, Parkham Street, Surrey Lane, Battersea, in the county of Surrey; and that the defendant did not nor did he ever reside or carry on business in the city of London."

G. Lewis shewed cause upon an affidavit of the plaintiff's attorney, who deposed that on the 24th of December last he at the plaintiff's request wrote to the defendant a letter from 48, King William Street, City, addressed to the defendant at his residence in Battersea, demanding payment of 8*l.* 8*s.* 6*d.*, "for goods sold and delivered, as per account rendered;" and that, on the 30th of December, he received at his office, 48, King William Street, in

the city of London, a letter of the defendant dated "2, Parkham Street, Surrey Lane, Battersea, December 30th, 1875," as follows, —"I will call at your office in the early part of next week, either on Monday or Tuesday, and hope to make some satisfactory arrangement for the payment of Mr. Taylor's claim, as I cannot possibly pay it down at once at present." That letter, upon the authority of *Evans* v. *Nicholson* (1), amounts to an account stated, and therefore gives a complete cause of action within the city of London, where it was received. Archibald, J., there says: "The plaintiff based his case on two grounds, the first being upon a claim for goods sold and delivered: but, with reference to that claim, the circumstances shewed that part certainly of the cause of action took place out of the jurisdiction, and, to entitle the Mayor's court, upon a prohibition being moved to issue to it, to proceed in the action, the whole cause must arise within the city. But he rested his case also upon a claim on an account stated. A letter written in such terms as to be an absolute admission of the debt being due was posted out of the city and received in it. The question is, where is the account stated? Now, as soon as it was put in the post by the defendant there was an account stated as against him, as is decided by the cases of *Dunlop* v. *Higgins* (2) and *Duncan* v. *Topham*. (3) But it was a continuing statement; and I see no difference between an acceptance of a contract and a statement of account, so far as the principle is concerned. It is true that, in *Dunlop* v. *Higgins* (2), it was not necessary for the Court to consider this point; but it is quite consistent with the judgment on the point decided that the acceptance was a continuing acceptance. The case of a statement is analogous, I think, to that of an acceptance; for, the transaction shapes itself thus,—When a letter is written by the creditor asking the debtor 'Do you owe the sum mentioned in this account?' and the answer is 'Yes,' then I think the answer is continuous until it reaches the person to whom it is sent, and is a statement to him then and at the place where he receives it."

Channell, in support of the rule. The whole cause of action did not arise within the jurisdiction of the Mayor's court. The letter

(1) 32 L. T. (N.S.) 778. (2) 1 H. L. C. 381.
(3) 8 C. B. 225; 18 L. J. (C.P.) 310.

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of the 30th of December does not amount to an account stated. Assuming *Evans* v. *Nicholson* (1) to be an authority against the defendants, there is a subsequent case of *Wallace* v. *Allan* (2) which is inconsistent with it. There, the cause of action arose in Surrey, but the defendant had at his place of business in the city of London admitted the debt and made appointments to pay it, which he had failed to keep. Lord Coleridge, in the course of the argument said: "This is not an application after trial and verdict for the plaintiff; and part of the cause of action, in fact the chief part of it, arose in Brixton, in Surrey; this is sufficient to entitle the defendant to a prohibition; it might be otherwise if the case had been already tried."

[ARCHIBALD, J. After trial the Court could see on what the verdict proceeded. (3)]

Evans v. *Nicholson* (1) turned upon the special circumstances of that case.

[BRETT, J. The only special circumstance was that there was an account stated within the city.]

It is not enough to shew a mere admission of the debt within the city, where the action is brought for goods sold and delivered without the jurisdiction.

BRETT, J. This rule for a prohibition was obtained upon an allegation that part of the cause of action arose out of the jurisdiction of the Mayor's court. The answer was that an account had been stated between the parties as to a specie sum within the city of London. To this it was rejoined that a statement of an account is only part of a cause of action. But I have heard nothing to satisfy me that an action may not be maintained in the Mayor's court upon an account stated within the jurisdiction. We, in this Court, think it is obligatory on us to grant a prohibition if it be clear upon the law and the facts that the inferior court is proceeding without jurisdiction. If it be doubtful, we do not interfere. It being doubtful here, and there having been a statement of an account within the city, I think the writ ought not to go. I do not think the remarks in *Evans* v. *Nicholson* (1) and *Wallace* v.

(1) 32 L. T. (N.S.) 778. (2) 44 L. J. (C.P.) 351; 32 L. T. (N.S.) 830.
(3) See *Ellis* v. *Fleming*, ante, p. 237.

(2) SC on appeal 1 LR 10 CP. 608

Allan (1) meant to make any distinction in this respect as to whether the application was before or after trial. In *Evans* v. *Nicholson* (2), the Court held that the account stated in the city gave a complete cause of action there. It is true that the application was after verdict; but all that the Lord Chief Justice meant to say was that there the verdict and judgment were a means of enabling the Court to arrive at the conclusion that there was a complete cause of action within the city. But, in *Wallace* v. *Allan* (1), where the whole cause of action arose without the jurisdiction, it was held that a mere admission of liability within the city would not sustain an account stated. Under the circumstances, I think this rule should be discharged without costs.

ARCHIBALD, J. I am by no means satisfied that a mere statement of accounts in the city would constitute a cause of action there. The matter being doubtful, the letter received in the city, which is some evidence of an account stated, is consistent with there being a cause of action arising there. I concur with my Brother Brett in thinking that the rule should be discharged without costs. The reference to a trial and verdict in the remarks made in *Evans* v. *Nicholson* (2) and *Wallace* v. *Allan* (1) was addressed to the circumstances under which those cases came before the Court. This seems to me to harmonize the two cases.

LINDLEY, J., concurred.

Rule discharged.

Solicitor for plaintiff: *H. A. Lovell.*

Solicitor for defendant: *John Hill.*

(1) 44 L. J. (C.P.) 351; 32 L. T. (N.S.) 830. (2) 32 L. T. (N.S.) 778.

I Com. Law Rep. 10 C.P. 607.

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Feb. 26.

NEWTON *v.* SHERRY AND OTHERS.

Executors and Administrators—Notice to Creditors and Others to make their Claims, under 22 & 23 *Vict. c.* 35, *s.* 29—*Sufficiency of Publication—Next of Kin.*

Sect. 29 of 22 & 23 Vict. c. 35 is not confined to claims of *creditors* of the testator or intestate, but applies also to persons having claims as *next of kin.*

It also affords protection to the sureties in an administration bond, where the administrator, before distributing the assets of the intestate, has pursued the course pointed out by that section.

A notice addressed to "creditors and other persons having claims or demands against or upon the estate of the intestate," requiring them to send in particulars of their claims or demands upon the estate to the administrator, or that, in default thereof, he will, at the expiration of the time mentioned in the notice, proceed to administer the assets of the deceased, having regard only to the claims and demands of which he should then have had notice:—

Held, a sufficient notice under the statute to a person having a claim as *next of kin.*

A., the daughter of the intestate, left her home at an early age (in 1857), changed her name, and, without notice to any of her relatives, went to America. In 1871 she returned to England and endeavoured to find her mother; but, the mother having changed her residence and married again, she was unable to find her. She again came to England in 1874, when she found that her mother was dead. In the meantime a sister of her mother had obtained letters of administration, and, after advertising in the *London Gazette* and in the *Times* and another London newspaper, in the terms of s. 29 of 22 & 23 Vict. c. 35, for "creditors and other persons having claims or demands against or upon the estate of the deceased," distributed the assets amongst the brother and two sisters (herself being one) of the deceased, being ignorant that the daughter, A., was still living.

In an action by A. (who had procured the revocation of the letters of administration granted to her aunt, and a fresh grant to herself, and an assignment of the administration bond) against the sureties:—

Held, that, the notice being good in form, and the publication all that could reasonably be required under the circumstances, the 29th section of 22 & 23 Vict. c. 35 afforded a good defence.

THE declaration stated that the defendants and Mary Ann Sherry, wife of the defendant Henry Sherry, by their bond dated the 13th of August, 1873, became jointly and severally bound to the Right Hon. Sir James Hannen, Knight, the judge of Her Majesty's Court of Probate, in the sum of 1000*l.*, to be paid by the said parties to the said Sir James Hannen, Knight, subject to the condition thereunder written in the words and figures following, that is to say, "The condition of this obligation is such that, if

the above-named M. A. Sherry, the natural and lawful sister and one of the next of kin of Sarah Gayler, late of No. 1, Temple Street, Queen's Road, Dalston, in the county of Middlesex, widow, deceased, who died on the 27th of February, 1871, and the intended administratrix of all and singular the personal estate and effects of the said deceased, do when lawfully called on in that behalf make or cause to be made a true and perfect inventory of all and singular the personal estate and effects of the said deceased which have or shall come to her hands, possession, or knowledge, or into the hands and possession of any other person for her, and the same so made do exhibit or cause to be exhibited into the principal registry of Her Majesty's Court of Probate whenever required by law so to do, and the same personal estate and effects and all other the personal estate and effects of the said deceased at the time of her death which at any time after shall come to the hands or possession of the said M. A. Sherry or into the hands or possession of any other person or persons for her, do well and truly administer according to law, that is to say, do pay the debts which she did owe at her decease, and further do make or cause to be made a just and true account of the said administration whenever required by law so to do, and all the rest and residue of the said personal estate and effects do deliver and pay unto such person or persons as shall be entitled thereto under the Act of Parliament intituled 'An Act for the better settling of Intestate Estates' (1), and if it shall hereafter appear that any last will and testament was made by the said deceased, and the executor or executors or other person therein named do exhibit the same into the said Court, making request to have it allowed and approved accordingly, if the said M. A. Sherry, being thereunto required, do render and deliver the said letters of administration (approbation of such testament being first had and made) in the said Court, then this obligation to be void and of none effect, or else to remain in full force and virtue:" Averment, that, afterwards, the said M. A. Sherry did become such administratrix as in the said condition mentioned, and thereafter, and before the commencement of this action, D. H. Owen, one of the registrars of the principal registry of Her Majesty's Court of Probate, did, pursuant to the 83rd section

(1) 22 & 23 Car. 2, c. 10.

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of the Court of Probate Act, 1857 (1), and by virtue of an order of the Right Hon. Sir James Hannen, Knight, judge of the said Court, assign to the plaintiff the aforesaid bond; and that the said M. A. Sherry did not make or cause to be made a true and perfect inventory as in the said condition mentioned, and did not well and truly administer according to law the personal estate and effects of the said Sarah Gayler, deceased, at the time of her death, or the other personal estate and effects of the said deceased which afterwards came to the hands and possession of the said M. A. Sherry, or into the hands or possession of other persons for her, and distributed the said personal estate to persons not entitled thereto by law; yet the defendants had not paid to the Right Hon. Sir James Hannen, or to the plaintiff, the said sum of 1000*l.*, or any part thereof: claim, 1000*l.*

The defendants pleaded,—first, a traverse of the execution of the bond,—secondly, that M. A. Sherry did not become such administatrix as alleged,—thirdly, a traverse of the assignment of the bond to the plaintiff,—fourthly, a traverse of so much of the declaration as alleged that M. A. Sherry did not make or cause to be made a true and perfect inventory,—sixthly, a traverse of so much of the declaration as alleged that M. A. Sherry did not well and truly administer according to law the personal effects of the said Sarah Gayler, deceased, at the time of her death, or the other personal estate and effects of the deceased which after came to the hands and possession of the said M. A. Sherry, or into the hands or possession of other persons for her, and distributed the said personal estate to persons not entitled thereto by law,—seventhly, a denial of the alleged breach.

Eighth plea,—as to so much of the declaration as the sixth plea was pleaded to,—that, after the making of the said bond, and after M. A. Sherry became such administatrix as aforesaid, and before the committing of the alleged breaches by the said M. A. Sherry, the said M. A. Sherry, pursuant to the enactment of 22 & 23 Vict. c. 35, s. 29, and the other enactments in that case made and provided, gave such or the like notices as would have been given by the Court of Chancery in an administration suit for creditors and others to send in to the said M. A. Sherry their claims against the

(1) 20 & 21 Vict. c. 77.

estate of the said Sarah Gayler, deceased, and that the said M. A. Sherry would at the expiration of the time in the said notices mentioned proceed to administer the estate, and distribute the effects of the said deceased among the parties entitled thereto, having regard only to the claims and demands of which she should then have had notice; that the said M. A. Sherry had no notice of the plaintiff being alive or having any claim upon the said estate; and that the said M. A. Sherry did at the expiration of the time mentioned in the said notices administer the said estate and distribute the assets of the said Sarah Gayler, deceased, amongst the parties entitled thereto, having regard to the claims of which the said M. A. Sherry had then notice,—which was the alleged breach.

Ninth plea,—for a defence upon equitable grounds, as to so much of the declaration as the sixth plea was pleaded to,—that, before the death of the said Sarah Gayler, and before the making of the said bond, and before the said M. A. Sherry became such administratrix as alleged, the plaintiff, being the daughter of the said Sarah Gayler, wilfully left her home and concealed herself, and refrained from communicating with her said mother and her relations and friends for many, to wit, sixteen years, and wilfully caused and procured her said mother and relations and friends, and the said M. A. Sherry and the defendants, to believe that the plaintiff was dead; that thereupon, on the death of the said Sarah Gayler, and with due knowledge of the said facts, Her Majesty's Court of Probate did grant administration of the personal estate and effects of the said Sarah Gayler, deceased, to the said M. A. Sherry, and the defendants made the said bond, and the said M. A. Sherry became such administratrix as aforesaid; that afterwards, the said M. A. Sherry, pursuant to the enactment of 22 & 23 Vict. c. 35, s. 29, and the other enactments in that case made and provided, gave such notices as would have been given by the Court of Chancery in an administration suit for creditors and others to send in to the said M. A. Sherry their claims against the estate of the said Sarah Gayler, deceased, and that the said M. A. Sherry would at the expiration of the time in the said notices mentioned proceed to administer the estate and distribute the assets of the said deceased among the parties entitled thereto, having regard

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only to the claims and demands of which she should then have had notice; that the said M. A. Sherry had no notice of the plaintiff being alive, or having any claim upon the said estate, and the said M. A. Sherry did at the expiration of the time in the said notices mentioned administer the said estate, and distribute the said assets of the said deceased among the parties entitled thereto, having regard to the claims and demands only of which she then had notice; which was the alleged breach by the said M. A. Sherry complained of by the plaintiff; and that the plaintiff had notice of the said death of the said Sarah Gayler, and of the said grant of administration to the said M. A. Sherry, and of all other the premises, and that the plaintiff wilfully, culpably, and negligently refrained from making any claim upon or communicating with the said M. A. Sherry or any other person, and caused and procured the said M. A. Sherry to believe that the plaintiff was dead, and to administer the said estate and distribute the said assets as aforesaid, although the plaintiff might and could have communicated with the said M. A. Sherry before such administration and distribution.

Issue was joined upon each of these pleas.

Demurrer to the eighth plea, on the ground that "the statute does not apply to actions on administration-bonds against the sureties;" and to the ninth plea, on the ground that "the plaintiff was not bound either in law or equity to communicate with her relations." Joinder.

The issues of fact came on to be tried before Denman, J., at the sittings in London after last Trinity Term. It appeared that Sarah Gayler, the intestate, formerly Sarah Newton, widow, was killed on the North London railway on the 27th of February, 1871; that the bond sued upon was executed on the 13th of August, 1873, by Mary Ann Sherry and her husband Henry Sherry, and by the defendants Pitt and Silk as sureties; that letters of administration of the personal estate and effects of Sarah Gayler, "who died a widow, without child or parent, intestate," were granted to Mary Ann Sherry, wife of Henry Sherry, "the natural and lawful sister, and one of the next of kin of the said deceased," on the 12th of September, 1873, and that a notice, of which the following is a copy, was published in the *London*

Gazette and in the *Times* and one other London newspaper, on or about the day of its date:—

Sarah Gayler, widow (formerly Sarah Newton, widow), deceased.

Pursuant to the Act of Parliament 22 & 23 Vict. c. 35, intituled "An Act to further amend the law of property and to relieve Trustees," notice is hereby given that all creditors and other persons having any claims or demands against or upon the estate of Sarah Gayler, late of No. 1, Temple Street, Queen's Road, Dalston, in the county of Middlesex, widow, deceased, formerly Sarah Newton, widow (who died on the 27th day of February, 1871, and of whose personal estate and effects letters of administration were granted by the Principal Registry of Her Majesty's Court of Probate on the 12th day of September, 1873, to Mary Ann Sherry, the wife of Henry Sherry, of No. 6, Devonshire Place, London Fields, Hackney, in the county of Middlesex, shoemaker, the natural and lawful sister and one of the next of kin of the said deceased, are hereby required to send in full particulars and proof of their claims or demands upon the estate of the said deceased, to the said Mary Ann Sherry, at the office of her solicitor, Mr. Thomas Angell, situate at No. 27, Gresham Street, in the city of London, on or before the 24th day of November, 1873, or in default thereof the said Mary Ann Sherry will at the expiration of that time proceed to administer the estate and distribute the assets of the said deceased among the parties entitled thereto, having regard only to the claims and demands of which she shall then have had notice; and all persons indebted to the estate of the said Sarah Gayler, widow, deceased, are hereby required to pay the amount of their respective debts to the said Mary Ann Sherry forthwith. Dated this 24th day of September, 1873.

The plaintiff, who was the daughter of Sarah Gayler by her first husband, left her home in April, 1857 (being then about seventeen years of age), and, without her mother's knowledge, without communicating her address to any one connected with her, and under an assumed name, went to the United States. In May, 1871, she returned to this country, and, after fruitless inquiries after her mother (who had changed her residence and had married Gayler), returned to the United States in the following July. In March, 1874, the plaintiff again came to England, when she for the first time discovered that her mother was dead, and that Mrs. Sherry (who was a sister of her mother) had obtained letters of administration and had divided the proceeds of her mother's estate between a Mrs. Messenger and Mr. George Dawkins (another sister and a brother of the intestate) and herself. The plaintiff thereupon, pursuant to an order of the Court of Probate dated the 15th of December, 1874, under s. 83 of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), obtained a revocation of the letters of

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administration granted to Mary Ann Sherry, and a grant of letters of administration to herself as the daughter and only next of kin of the intestate; and, finding that all the assets of the intestate (amounting to 263*l.*) had been disposed of in the manner above mentioned, got an assignment of the administration bond, and brought this action against the sureties.

The plaintiff swore that the advertisements published by Mary Ann Sherry never came to her knowledge. There was no evidence to shew that Mrs. Sherry knew that the plaintiff was living until after her second return to this country, in 1874.

It was contended on the part of the plaintiff that s. 29 of 22 & 23 Vict. c. 35 was not intended to apply to persons claiming as next of kin, but only to persons claiming as creditors or quasi creditors, and that the advertisements issued were not such as to satisfy the terms of that section.

The learned judge directed a verdict for the plaintiff for 263*l.* upon all the issues of fact except the issues on the fourth and fifth pleas, reserving leave to the defendants to move to enter a verdict for them, if the Court should be of opinion that the other pleas were proved.

Lumley Smith in the last Michaelmas sittings obtained a rule to enter a verdict for the defendants on the sixth, seventh, eighth, and ninth pleas, on the ground that those pleas were proved.

Reid (*Day, Q.C.*, with him,) shewed cause and supported the demurrers. The rights of an assignee of a bond under the statute are defined in *Sandry* v. *Michel.* (1)

[BRETT, J. The real question is whether the eighth plea was proved.]

The plea is founded upon s. 29 of 22 & 23 Vict. c. 35, which enacts that, "where an executor or administrator shall have given such or the like notices as in the opinion of the Court in which such executor or administrator is sought to be charged would have been given by the Court of Chancery in an administration suit, for creditors and others to send in to the executor or administrator their claims against the testator or intestate, such executor or administrator shall at the expiration of the time named in the

(1) 3 B. & S. 405; 32 L. J. (Q.B.) 100.

said notices or the last of the said notices for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of distribution of the said assets or a part thereof, as the case may be; but nothing in the present Act contained shall prejudice the right of any creditor to follow the assets or any part thereof into the hands of a person or persons who may have received the same respectively." The object of the statute was to relieve executors and administrators against the claims of creditors, provided they give such notices as the Court of Chancery would require to be given in an administration suit: see 2 Wms. Ex. 7th ed. 1355; Daniell's Ch. Pr. 5th ed. 1091, 1092, 1110. In *Wood* v. *Weightman* (1), Lord Romilly, M.R., says: "The 29th section of the Act is only a protection to executors who have given 'such or the like notices as would have been given by the Court of Chancery in an administration suit.' Now, these executors have only caused advertisements to be inserted in local newspapers, which is insufficient. In this Court we never allow an estate to be distributed without notice being inserted in the *London Gazette*, and generally we require an advertisement to be inserted in the *Times*. When an estate is administered of a testator in the country, the notice is also inserted in some newspaper having a local circulation in the neighbourhood." Here, the advertisements were published only in London. Mrs. Sherry did not say that she was not aware that the daughter was alive.

[BRETT, J. A girl of seventeen runs away from her home, changes her name, and goes to America without communicating with her family, and stays away for sixteen years. Advertisements are inserted in the *London Gazette* and in London newspapers. She makes no claim. Is not that *some* evidence from which it might reasonably be assumed that she was not living?]

The advertisements were for creditors, not for next of kin.

[BRETT, J. They are addressed to "creditors and other persons

(1) Law Rep. 13 Eq. 434, 436.

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having claims against the estate:" and they follow the very terms used in s. 29 of 22 & 23 Vict. c. 35.]

The statute, at all events, does not discharge the sureties in the bond. There was no evidence to support the ninth plea.

Lumley Smith, contrà. It may be conceded that there was not evidence enough to support the ninth plea. The defendants, however, are clearly entitled to a verdict on the sixth and eighth pleas. If the estate has been administered according to law, that is all that the statute requires: the bond is satisfied. The real question is whether the plaintiff is not estopped by her own conduct from enforcing the penalty of the bond against the sureties. She left her home in 1857, being then about seventeen years of age. She remained in London about two years, and then, having changed her name, she went to America, and was heard of no more by any member of her family until 1874, which was some months after the assets of the intestate had been distributed in a due course of administration.

[BRETT, J. How can we say that the eighth plea was proved, when neither party asked to have the question left to the jury? We cannot assume that Mrs. Sherry, the administratrix, had no notice that her niece was living. The case must go down again.]

[After some discussion, it was arranged, inasmuch as neither party was desirous of incurring the expense of a new trial, that Mrs. Sherry should be examined and cross-examined before a judge at chambers as to whether or not she was aware of her niece's existence at the time the assets were distributed by her, and that the decision of the rule and of the demurrers should abide the result of the learned judge's report.]

BRETT, J. We are not called upon to decide as to the validity of the ninth plea: it being admitted that there was no evidence in support of that plea, the verdict on that issue was rightly found for the plaintiff. As to the eighth plea, the question is whether that is a good plea; and that depends upon whether or not the case of an administrator with regard to claims of next of kin is within the 29th section of 22 & 23 Vict. c. 35. The title of the statute is "An Act to further amend the law of property and to

relieve trustees." Beyond doubt executors and administrators were intended to be protected by it. The question here is whether the administrator is protected where he has literally followed the directions contained in that section. The enactment in substance is, that, where an executor or administrator shall have given such or the like notices as would have been given by the Court of Chancery in an administration suit, for creditors *and others* to send in their claims against the estate of the testator or intestate, such executor or administrator shall, at the expiration of the time named in the notices for sending in such claims, be at liberty to distribute the assets of the testator or intestate amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets so distributed to *any person* of whose claim he shall not have had notice at the time of distribution of the said assets. It was argued by Mr. Reid that that section is confined to the claims of creditors, and that next of kin are not comprised within the general words "and others." The words, however, are large enough to embrace next of kin. The executor or administrator is to be at liberty to distribute the assets amongst the parties entitled thereto, having regard to *the claims* of which he has then notice; and he is not to be liable to *any person* of whose *claim* he shall not have had notice at the time of distribution. Then follows a proviso that nothing in the Act contained shall prejudice the right of any creditor or *claimant* to follow the assets into the hands of the person or persons who may have received the same. It seems to me that the enactment was made for the protection of administrators. Now, the danger to the administrator of a claim by a next of kin being preferred after a distribution of assets is equally great as that of a claim by a creditor: and, giving to the words their ordinary construction, it seems to me that he was intended to be protected against the one as well as against the other, provided he followed the course pointed out by s. 29; in other words, that that section includes next of kin as well as creditors of the intestate. If so, the plea is a good one.

The next question is, whether the administratrix has in this case followed the directions of the statute. She did advertise: but it is said that she did not advertise in the manner required by s. 29,

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because the notices did not in terms call upon the next of kin to come in and claim. The advertisement, however, follows the very words of the statute, and gives notice "that all creditors *and other persons* having any *claims* or demands against or upon" the estate of the intestate, are required "to send in full particulars and proof of their *claims or demands upon the estate* of the deceased" by a given day. It seems to me that that was a sufficient notice to include a person having a claim as next of kin. Then it is said that the notice was not published in all necessary places. In dealing with this matter, I wish to be very guarded. I agree with Mr. Reid, that it is important that the estates of intestates should not be distributed without every reasonable means being taken to give notice to all who may have claims, whether as creditors or otherwise. Save in some exceptional cases, it is usual to confine these notices to the *London Gazette* and some English newspapers. If, however, there be any reasonable ground for supposing that there is a claimant residing in a foreign country or in one of our colonies, the notice should be advertised there also. Therefore, if the administratrix here had any reasonable ground for believing that the daughter of Mrs. Gayler was alive in America, she ought to have advertised in some newspaper or newspapers there. But, seeing the unpleasant circumstances under which she left her family, having changed her name and gone abroad, and there being no evidence that the administratrix had reason to believe that she was in America, I think the advertisements were not improperly confined to this country.

Then comes the question whether the administratrix had notice before she distributed the assets that her niece was alive. There certainly was evidence upon which a jury might reasonably have found that she had no notice. I feel it to be so important that persons having claims against the estates of testators or intestates should not upon light grounds be shut out from the opportunity of asserting them, that I should have been inclined to send this matter back to be ascertained by a jury, had it not been the wish of both sides that that expense should be avoided. Under these circumstances, my Brother Lindley will consent to have the administratrix, and her only, examined before him. And, if he reports to us that he is satisfied that she had no such notice, the

verdict will be for the defendant; if otherwise, the verdict for the plaintiff will stand.

ARCHIBALD, J. I will only add as to the eighth plea and the statute upon which it is founded, that I think s. 29 is not to be read in the limited sense suggested by Mr. Reid. The earlier part is plainly intended for the protection of executors and administrators, and to enable them safely to make a distribution of their testator's or intestate's estate in a reasonable time. At one time I was inclined to think there was some substance in the distinction suggested between creditors and persons claiming as next of kin. But, upon the whole, I think the section was intended to embrace all classes of claims, especially when I find in the proviso at the end the word "claimant" added to "creditor." The reason of the statute is as applicable to claims to distributive shares of the assets as to claims for debts and demands in the nature of debts. The same need of protection existed as to the one as it did as to the other. As to the form of the advertisements, I entirely agree with my Brother Brett. I also agree with him as to the importance of their being circulated in such a manner as to give all parties interested every reasonable notice to come in and claim. Whether the notice was properly advertised or not is a question of degree, and depends upon whether under the circumstances of each particular case such reasonable opportunity has been given. Here, the estate to be administered was in England: the family were all English: and all that seems to have been known of the claimant was, that she had changed her name and gone away from home, and had not been heard of for several years. There was in my opinion no necessity for advertising otherwise than in the *London Gazette* and in the English newspapers. Upon the whole, I think the course proposed by my Brother Brett is the reasonable and proper one.

LINDLEY, J. I am of the same opinion. As to the question on the application of s. 29 of 22 & 23 Vict. c. 35 to claims by next of kin, it seems to me that it would be putting too narrow a construction upon that enactment to hold it to be confined to persons claiming to be creditors. The real object of the section was this, not merely to secure an indemnity to executors and administra-

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tors, but for the benefit also of persons having claims against the estates of deceased persons, by enabling the executor or administrator to administer the estate without the expense and delay of a Chancery suit. If proper advertisements are issued for "creditors and others" (that is, persons having claims upon the assets, whether as creditors or otherwise,) to come in and substantiate their claims, the executor or administrator is not liable for parting with the assets in a due course of administration amongst those of whose claims he has notice. If, therefore, this had been a claim against the administatrix herself, I think she would have been protected by the Act. Then remains the question raised by the demurrer to the eighth plea, viz. whether the statute applies to actions on administration bonds against the sureties. If this demurrer were to succeed, the result would be that the defendants would have recourse over against the administatrix. I cannot think that would be a result that could have been contemplated by the legislature. Looking at the language of 22 & 23 Vict. c. 35, s. 29, I think the form of the notice was sufficient. As to the places where the advertisements were published, that will depend upon what may appear upon the inquiry which is to take place before me.

Cur. adv. vult.

Feb. 26th. LINDLEY, J. This case stood over for the examination and cross-examination of the administatrix before me as to whether or not, at the time she parted with the assets, she had notice or knowledge that the claimant, the daughter of the intestate, was living. That examination and the documents which were produced before me satisfied me that she was not aware that her niece was then living. The Court having already decided that the advertisement issued by the administratrix was sufficient in form and properly published, the rule will be absolute to enter a verdict for the defendants on the sixth, seventh, and eighth pleas; and there will also be judgment for the defendants on the demurrer.

Rule accordingly.

Solicitors for plaintiff: *Wright, Bonner, & Wright.*
Solicitor for defendants: *F. W. Imbert Terry.*

[IN THE COURT OF APPEAL.]

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Dec. 15.

FISHER *v.* THE VAL TRAVERS ASPHALTE COMPANY.

*Appeal—Divisional Court—Judge—*38 & 39 *Vict. c.* 77, *s.* 4.

An appeal can be heard by the Court of Appeal, although one of the judges then in the Court is a judge of the Division in which the action is pending, if he has taken no part in making the order appealed from.

THIS was an action in the Common Pleas Division, and the plaintiff had obtained a verdict for damages. The defendant then moved before a Divisional Court of that Division, consisting of Lord Coleridge, C.J., Archibald, J., and Amphlett, B., who granted a rule to shew cause why there should not be a new trial, but as to part only of the damages.

Philbrick, Q.C., applied by way of appeal, for a rule generally, but mentioned a doubt whether the appeal could be heard before the Court as then constituted (James, L.J., Mellish, L.J., Baggallay, J.A., and Brett, J.), Brett, J., being one of the judges of the Division in which the appeal rose.

[MELLISH, L.J. There has been a question raised as to the meaning of s. 4 of the Act of 1875 (1), viz. whether a judge of the Court of Appeal is not disqualified from hearing an appeal in an action pending in the Division of which he is a member. There seem to be only two ways of giving a meaning to the section, and either the words "and is" must be rejected, or else "Divisional Court" must be read as "Division." It seems to me that the former way is the fittest, for there can be no reason why a judge should not hear an appeal from a judgment or order in the making of which he had taken no part.]

JAMES, L.J. We are all of opinion that the Court as at present constituted, can hear this appeal.

(1) 38 & 39 Vict. c. 77 (Judicature Act), s. 4: "Section 54 of the principal Act is hereby repealed, and instead thereof the following enactment shall take effect: No judge of the said Court of Appeal shall sit as a judge on the hearing of an appeal from any judgment or order made by himself, or made by any Divisional Court of the High Court of which he was and is a member."

SC as to damages post, 511

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MELLISH, L.J., BAGGALLAY, J.A., and BRETT, J., concurred.

Their Lordships then heard the appeal, and dismissed it.

Solicitors: *Drake & Son.*

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April 28.

CRUIKSHANK *v.* THE FLOATING SWIMMING BATHS COMPANY.

Arbitration—Award—Supreme Court of Judicature Act, 1873 (36 & 37 *Vict.* c. 66), *ss.* 56–58—*Supreme Court of Judicature Act* (38 & 39 *Vict.* c. 77), *Order XXXVI., Rules* 30–34.

The old law and practice with regard to references to arbitration are not abolished by the Judicature Act, and consequently where a cause is referred to an arbitrator for decision according to the old practice, the arbitrator cannot be called on to report to the Court with regard to the matter referred to him, but his decision is final.

An order was made that a cause should be referred to the master, and that the subsequent proceedings should be continued and concluded according to the new practice:—

Held, that the reference was not merely for report by the master under the new powers given by the Judicature Act, but for decision, and that the master could not be made to report to the Court, but his decision was final.

IN this case, the action having been commenced before the Judicature Act came into operation, an order had been made at Chambers after it came into operation, by which it was ordered that the defendants were to be at liberty to deliver a counter-claim and to make certain amendments in the pleas, and that the action should be referred to a master, and the subsequent proceedings be continued and concluded under the new practice. The master had heard the case, and made his certificate, and the defendants applied to set aside that certificate, and that the master should be ordered to report to the Court in relation to the matters referred to him.

Holl, for the defendants, in support of the application. The order directs that the reference should be under the new practice, and by the new practice the referee, whether official or special, is not to decide finally, but only to report to the Court: Judicature Act, 1873, ss. 56, 57. The intention was that the Court should have some control over the arbitrator, and that the hardships

which formerly arose from the absence of any power to review his decision should be avoided. The main question now existing between the parties here is a question of law turning on the construction of a deed and the defendants' wish that the master's decision as to that should be reviewed.

[BRETT, J. The order does not refer any particular question or issue with directions to report, but the whole cause.]

The Act would enable a reference of all the questions in the cause for report. The intention of the Act was merely to substitute the referee for a jury at nisi prius: Judicature Act, 1873, s. 58.

F. M. White, contrà. The 56th and 57th sections of the Judicature Act, 1873, do not apply to a reference of the whole cause, or of the whole cause and all matters in difference, by consent.

[LORD COLERIDGE, C.J. If the reference is one under the Judicature Act, 1873, is not the 58th section conclusive against you, and does not Order XXXVI., Rule 34, imply that there is always to be a report?]

This is not a reference under the Act. There is no power under the Act to refer the whole cause, but only particular questions or issues. There should have been an express order that the master should report, if it was only intended that the cause should be referred to him to report. The old law and practice as to references still exists, and when a cause is referred, as it is contended this obviously was, for decision by the arbitrator, the Court has no power to review his decision.

Holl, in reply. It would be a very narrow construction of the Act to say that there was no power under it to refer a cause. The 30th Rule of Order XXXVI. obviously implies that there is such power.

LORD COLERIDGE, C.J. I am of opinion that this rule should be refused. The motion is to set aside the certificate of the master, and that he should be directed to report to the Court on the matters referred to him. The action had been commenced under the old system of procedure, which did not admit of a counterclaim, but while it was proceeding the Judicature Acts came into operation, and the defendants went before the master and applied

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for leave under the new rules to set up a counter-claim. Thereupon an order was made that the counter-claim might be set up, and the necessary amendments made, and that the action should be referred to a master, and the subsequent proceedings should be continued and concluded under the new practice. The contention for the defendants is that, as the Judicature Act contemplates that in all references under it there should be a report made to the Court by the referee, and the order directs that the subsequent proceedings shall be under the new practice, it is necessarily a part of the order that the master, instead of deciding the matter himself, should report on it to the Court. The answer made on the part of the plaintiff to that argument is as follows: it is contended that the Judicature Act preserves the old procedure when not inconsistent with the new, and that the procedure under the Common Law Procedure Act and the old law as to arbitrations continue to exist; that this was a reference to the master as under the old practice, but inasmuch as many advantages were given to the defendants by the Judicature Act with regard to setting up a counter-claim and other matters, it was provided that the proceedings should, so far as such matters were concerned, be continued according to the provisions of the Judicature Act. The effect of the order, therefore, is alleged to be that the cause was referred for decision by the master, though in arriving at such decision the procedure and practice under the new law were to be followed. It appears to me that this contention is correct, and that a cause may still be referred to an arbitrator for decision, and when it is so referred the old rule applies that the decision of an arbitrator chosen by the parties is final. That being so, it is perhaps unnecessary to go minutely into the provisions of the Act and rules so far as they affect arbitrations exclusively under the Judicature Act, and I do not wish by anything I may say to bind myself absolutely hereafter. It appears to me, however, as at present advised, that the powers of reference given by the Judicature Act are not by way of repeal of, or in substitution for, but in addition to, the former powers of reference, and that the intention was to give to any Division of the Court the power to refer any question or questions which may arise in the course of a cause (and I do not say that the whole cause may not be referred), not for decision by the arbitrator, but for a report on which the Court may afterwards

pronounce the decision. This seems to me to be the effect of the Act, but the old power of referring a cause for decision still exists, and I think in the present case the true construction of the order is, that the cause was referred for decision and not for report.

BRETT, J. I am of the same opinion. The contention of the defendants is that the defendants have a right to call on the master to report to the Court, and on such report the Court has power to inquire into any alleged miscarriage caused by the erroneous decision of the master on matter of law or of fact. The plaintiff's contention is that under this order the Court cannot inquire into the matter or make the referee report, but his decision is final unless defective on the face of it. It seems to me that the defendants' contention must necessarily go the length of saying that, since the Judicature Act, the decision of an arbitrator is in all cases open to revision by the Court; that in every reference, one party or the other may insist on the arbitrator's making a report, and that the Court may then inquire into any alleged miscarriage by the arbitrator. Now it seems to me that the answer to that contention depends on the Judicature Act, 1873, and the Common Law Procedure Act, 1854, taken together. The two are to be read together, and, to understand their effect, we must first consider what the old law was. Before the Judicature Act, a common-law Court, by consent of the parties, had power to refer to a master or an arbitrator, and under some circumstances they could refer compulsorily; but the reference could only be for decision, and that decision was final. There was no power to refer a case for inquiry and report. But in the Chancery courts, I am informed, the common practice was to refer a question to the chief clerk or other officer, to report upon. Such a reference might be, I understand, of all the questions in a cause. The Court, upon the report of the referee, considered his findings, and thereupon pronounced a decree. Now, the Judicature Act and rules were passed with the object of making the procedure uniform in the different Divisions. It was unnecessary for this purpose to take away the power of ordering a cause to be referred for decision in the old way, but a power was wanted to refer questions or causes for a report by the referee on which the Court might afterwards decide the case. Taking the Common Law Procedure Act and the Judi-

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cature Act together, it seems to me that the law is now this. There are two different kinds of reference. One is a reference of the cause for decision. It does not follow that no part of the Judicature Act or Rules applies to such a reference. Much of them is applicable. The reference is one under the Common Law Procedure Act and Judicature Act taken together, and the rules of the latter as to pleading, evidence, summoning witnesses, &c., will be applicable to such a reference. But if the reference is for decision, I think the old law applies; and the decision of the arbitrator is final, unless a defect appears on the face of the award. The other kind of reference which the common-law Divisions are empowered by the Act to make is a reference of one or more question or questions in the cause or all the questions in the cause, or, if you please so to call it, of the cause itself, for report by the arbitrator. With respect to this class of reference, my present impression is that the Court may review the report and the findings of the arbitrator, either in respect of law or fact. There being these two kinds of reference, the question in this case is, of which kind the present reference is. It seems to me that here the order refers the cause to the master, not to report upon, but to decide.

LINDLEY, J. I agree. I think, if we look at the Common Law Procedure Act and the Judicature Acts, and especially the 21st section of the Act of 1875, the result is that there may be references of two classes; one class being references of matters for report, the other for decision. Either the whole or any part of a cause may, I think, be referred in either way. If the reference is for report, the report may be reviewed; if it is for decision, the decision is final, just as before the Act. The question, therefore, is, which the reference in this case was. I think the order itself clearly shews that the cause was referred to the master for decision, not for report. The direction that the subsequent proceedings should be continued under the new practice seems to me quite consistent with this view.

Rule refused.

Solicitor for plaintiff: *J. J. Soloman.*
Solicitors for defendants: *Combe & Wainwright.*

BLACKLOCK *v.* DOBIE AND ANOTHER.

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April 26.

Illegal Agreement—Fraud on Creditors—Assignment of Debtor's Estate for the Benefit of Creditors—Bankruptcy.

Declaration for breach of an agreement, whereby, in consideration that the plaintiff would assign all his estate to the defendants, two of his creditors, as trustees for the equal benefit of all his creditors, and would disclose to the defendants all his estate, the defendants promised, upon the realization of his estate, to return and pay to the plaintiff 50*l.*:—

Held, on motion in arrest of judgment, that the declaration was bad, inasmuch as the agreement therein set forth, being made without the consent of the creditors, was illegal as a fraud on their rights.

DECLARATION set forth an agreement that, in consideration that the plaintiff would execute to the defendants, as trustees for the plaintiff's creditors, an assignment of all his estate and effects upon trust for the equal benefit of all his creditors, the defendants being themselves creditors of the plaintiff, and would make to the defendants a full disclosure of all his estate and effects, the defendants promised the plaintiff that upon the realization of his said estate and effects they would return and pay to the plaintiff the sum of 50*l.*

Averment of performance of all conditions precedent.

Breach, non-payment of the 50*l.*

The further pleadings are immaterial to the point now reported.

The verdict at the trial passed for the plaintiff, and a rule was afterwards obtained to arrest the judgment on the ground that the agreement set out in the declaration was illegal, immoral, and contrary to the policy of the bankruptcy law.

Shortt shewed cause. There is nothing to shew that this agreement was in any way a fraud on the creditors, which is the only kind of illegality that can be in question. There was no plea of fraud or illegality, and there is no finding of fraud in fact. The substance of the transaction is simply that the debtor gives away all his property for the benefit of his creditors with a certain exception. There is nothing to shew that any release was procured, or that he does not still remain liable to his creditors for any amount

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of debts unpaid. Moreover it is quite consistent with the declaration that the creditors were all in fact paid in full.

[He cited *Shaw* v. *Beck.* (1)]

Gully, in support of the rule, was not called upon.

LORD COLERIDGE, C.J. I am of opinion that this declaration is bad, and the judgment must be arrested. It appears on the face of the agreement that the realization of the whole of the estate for the benefit of the creditors was necessary in order to defray the plaintiff's debts, and yet it stipulates for a return of 50*l.* to the plaintiff by the trustees as the consideration for the giving up of the estate. It seems to me that such an agreement is a fraud on the creditors under the bankruptcy laws.

BRETT, J. I am of the same opinion. This agreement appears to me to disclose one of the most ordinary frauds that are attempted to be committed, viz. an arrangement with a friendly creditor by which there appears to be a handing over of all the property for the benefit of the creditors, whereas a part of it is kept back.

LINDLEY, J. I am of the same opinion. It seems to me clear that this agreement was illegal. The natural effect would be that what purported to be an assignment of all the estate would be all that would come to the knowledge of the creditors, whilst there was in truth a secret bargain that a part of the estate should be kept back.

Rule absolute.

Solicitors for plaintiff: *Milward & Whitehead, for Carruthers.*

Solicitors for defendants: *Venn & Son.*

(1) 8 Ex. 392.

CAMPBELL AND OTHERS *v.* IM THURN AND OTHERS. 1876 May 2.

Bankruptcy—Composition—Non-payment of Composition by Trustee—Name and Address of Creditor not inserted in Statement of Debtor—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 126.

The Bankruptcy Act, 1869, s. 126, provides that "the creditors of a debtor unable to pay his debts may, without proceedings in bankruptcy, by an extraordinary resolution, resolve that a composition shall be accepted in satisfaction of the debts due to them from the debtor." It provides that the extraordinary resolution may be passed by a certain majority in number, and three-fourths in value, of the creditors at a meeting to be summoned in a certain way, and makes other provisions as to the conduct of the proceedings, and then enacts that "the provisions of a composition accepted by an extraordinary resolution in pursuance of this section shall be binding on all the creditors whose names and addresses, and the amount of the debts due to whom, are shewn in the statement of the debtor produced to the meetings at which the resolution has passed, but shall not affect or prejudice the rights of any other creditor:"—

Held, that the provision as to the insertion of the names, &c., of creditors in the debtor's statement only applies to non-assentient creditors, and that creditors who voluntarily come in and join in passing the resolution for the composition are bound, although their names, &c., are not inserted.

To an action by the plaintiffs, as indorsees of a bill of exchange, against the defendants as acceptors, the defendants pleaded that the necessary proceedings for a composition by the defendants under s. 126 had been taken, and that a trustee on behalf of the creditors had been appointed by the extraordinary resolution for receipt and distribution of the composition, and that a sum sufficient to pay the composition had been duly paid to the trustee for the purpose of his paying the same pursuant to the resolution, the plaintiffs replied that the amount of the composition due to them was not paid or tendered to them, but the trustee, by the direction, request, and procurement of the defendants, refused to pay the same to the plaintiffs:—

Held, a bad replication, on the ground that the defendants were discharged on the payment to the trustee of money applicable to and sufficient to pay the composition.

The mere non-payment by the trustee does not defeat the composition, and the money being impressed with a trust for the benefit of the creditor, any direction by the debtor with respect to it is a nullity.

Semble, the trustee is entitled before paying over the composition to a creditor to investigate the validity of his claim.

DECLARATION by the plaintiffs, as indorsees of a bill of exchange for 1373*l.* 3*s.* 11*d.*, against defendants, as acceptors, for non-payment of the bill.

Plea, that after the accruing of the plaintiffs' claim, and before action, the defendants, being unable to pay their debts, duly petitioned the London Court of Bankruptcy, which then had jurisdic-

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tion in that behalf under ss. 125 and 126 of the Bankruptcy Act, 1869, in the form prescribed, and such proceedings were thereupon had that the creditors of the defendants, by an extraordinary resolution duly passed under s. 126 of the said Act, resolved that a composition of 5*s.* in the pound, to be payable at the expiration of twenty-eight days after the registration of that and the confirming resolution, should be accepted in satisfaction of the debts due to the creditors of the defendants, and that John Young should be appointed trustee for and on behalf of the creditors for the purpose of receiving on their behalf and paying to them such composition, which resolution was afterwards duly confirmed and registered in accordance with the provisions of the said Act. The above-mentioned extraordinary resolution, and the resolution confirming the same, were respectively duly assented to and signed by the plaintiffs and the defendants, and the defendants say that a sum sufficient to pay the said composition of 5*s.* in the pound was before this action, and within twenty-eight days after the registration of the extraordinary resolution, duly paid to and received by the said John Young for the purpose of his paying the same pursuant to the said resolution, and all necessary conditions were fulfilled to make the said resolution binding on the plaintiffs and a bar to the action.

Issue.

2nd replication: That the amount of the said composition due to the plaintiffs under the said extraordinary resolution was not paid or tendered to the plaintiffs within the time mentioned in that behalf, nor was the same or any part thereof paid to the plaintiffs; but the said John Young, by the direction, request, and procurement of the defendants, refused to pay the said amount to the plaintiffs.

Issue and demurrer to the 2nd replication.

At the trial before Bramwell, B., at the Hilary sittings in Middlesex, 1876, the facts were as follows:—Proceedings had taken place, as stated in the plea, for effecting a composition under the 126th section of the Bankruptcy Act, 1876. The name and address of the plaintiffs' firm were not included in the defendants' statement of debts under that section, though the amount of the bill was included among their liabilities. It was admitted that the defendants then knew that the plaintiffs were the holders of the bill

and their address. At the first meeting of creditors under the proceedings the plaintiffs claimed for their debt, and voted in favour of the composition, and they also voted in favour of the composition at the meeting at which the confirming resolution required by the 126th section was passed. A Mr. John Young, who had been appointed receiver under bankruptcy proceedings which had been previously initiated, was appointed by the resolutions a trustee for the receipt and distribution of the composition. It appeared that money, the proceeds of the defendants' estate, sufficient to satisfy the composition on all the liabilities of the defendants, including the plaintiffs' claim, was in Mr. Young's hands previously to the time when the composition was due. But on the evening of the day of the first meeting an indorsement was made by the debtor's solicitors, without the knowledge of the plaintiffs, and signed by the trustee on the plaintiffs' claim, or proof, as follows: "This proof is objected to on behalf of the debtors on the ground that the two last-mentioned bills in the schedule to the proof were accepted by the claimants in payment of the first mentioned, which should be given up to be cancelled."

The trustee did not pay the plaintiffs the composition on the sum due on the bill sued on. He was called and denied that he acted, in so refusing payment, on the direction of the defendants.

The jury found, with regard to the issue on the second replication, that the trustee did not refuse to pay the amount of the composition by the direction, request, or procurement of the defendants.

The learned judge refused to enter judgment, and the verdict was entered for the defendants, leave being reserved to the plaintiffs to move to enter it for themselves for 601*l.* 12*s.* 6*d.* and interest thereon (the amount claimed as remaining due on the bill), on the ground that the plea was disproved, and the second replication proved, or that sufficient of the second replication was proved, to entitle the plaintiffs to a verdict, and that on the facts proved at the trial the plaintiffs were entitled to recover.

Notice had been given to the defendants by the plaintiffs that the case had been set down on motion to enter the verdict in pursuance of the leave reserved, and that the Court would be moved for judgment in favour of the plaintiffs; and that, upon

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such motion, the plaintiffs would object to the direction of the learned judge who heard the cause.

The demurrer to the second replication came on for argument with the motion.

Herschell, Q.C., and *W. G. Harrison*, for the plaintiffs, in support of the motion and the replication. The cases clearly shew that if the composition is not paid or tendered the creditor is remitted to his original debt: *Edwards* v. *Coombe.* (1) The mere fact that the payment is to be carried out through the intervention of a trustee makes no difference. The debtor must shew that he paid money over to the trustee to be paid to the creditor in respect of the composition. It is immaterial that the money comes into the trustee's hands if he is directed not to pay the amount over to the creditors. The debtor cannot take advantage of an arrangement which he has prevented from being carried out. The effect of the indorsement on the proof clearly was that the trustee was thereby directed or procured not to pay the composition. The plaintiffs, it is true, agreed to the composition, but then no objection was made to them with respect to their claim. Are they to be bound by the arrangement so made on the footing that their debt was admitted and they were to receive the composition, when behind their backs a direction was given to the trustee that they were not to have the composition?

[BRETT, J. There is no suggestion of fraud on the pleadings.]

There never was any real agreement, for the parties did not both agree. The plaintiffs agreed to give up their debt for a specified composition, but defendants never agreed to pay the composition. The whole meaning of the composition arrangement is that it is made with persons whose debts are admitted. The creditor gives up his original debt on the footing that his claim to the composition on it is admitted. Can the defendants say that the plaintiffs are bound by their assenting and coming in, when they never assented to the plaintiffs coming in? The judge ought to have directed the jury that the replication, or sufficient of it to answer the plea, was proved. [They cited *Ex parte Peacock* (2) and *Edwards* v. *Hancher.* (3)]

(1) Law Rep. 7 C. P. 519. (2) Law Rep. 8 Ch. 682. (3) Ante, p. 111.

But, further, the composition was not binding on the plaintiffs, because their names and addresses were not inserted in the debtor's statement of debts in accordance with the 126th section of the Bankruptcy Act.

Benjamin, Q.C., and *Holl*, for the defendants, against the motion and in support of the demurrer. The provision of the Bankruptcy Act, 1869, s. 126, which requires the insertion of the creditor's name and address, applies only to dissentient creditors. It has no application as to creditors who voluntarily come in and accept the composition, as the plaintiffs did. The result of omitting the name is that the creditor need not come in, and if he does not, will not be bound; but if he does so voluntarily, why should he not be bound? The real question is whether, where a creditor has agreed to accept a composition, and joined in appointing a trustee for its receipt on his behalf, and money has been paid to the trustee applicable to the composition and sufficient to cover it, the mere fact that the composition is not paid over by the trustee is to upset the composition altogether and remit the creditor to his original debt. It is clear that it is not so: *Ex parte Waterer.* (1) The trustee is entitled to inquire into the validity of the claim: *Ex parte Botting.* (2) The agreement to pay the composition is provisional upon the debt being satisfactorily made out, and if the trustee improperly refuses to pay over the amount, the remedy is by an application to the Court of Bankruptcy and not by suing for the original debt. With regard to the second part of the replication, it was negatived by the finding of the jury. They found that the trustee did not refuse to pay by the request or direction of the debtors. The endorsement was not a direction not to pay over, but merely an intimation to the trustee that the claim ought to be investigated. This the defendants had a perfect right to give. Moreover, such a direction, if given, was a nullity. The trustee was not entitled to act on it, and was bound, if satisfied of the propriety of the claim, to pay over the amount.

Herschell, Q.C., in reply. The section makes no distinction between compositions where there is a trustee, and where there is not. All the arguments employed on the defendants' behalf would have applied in the case of *Edwards* v. *Coombe.* (3) It might be

(1) 43 L. J. (Bankcy.) 25. (2) Law Rep. 19 Eq. 261.
(3) Law Rep. 7 C. P. 519.

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said, there, that the proper remedy was to apply for the composition in bankruptcy; but it was held that it was essential to the composition being a defence to the claim for the original debt that it should have been paid or tendered. Payment to the trustee was no payment of the composition within the meaning of that decision, unless the money had been paid to the trustee for the purpose of paying the composition. Here no money was ever so paid; on the contrary, the defendants always objected to the claim, and to the trustee's paying over the money.

BRETT, J. In this case the plaintiffs have brought an action against the defendants for the full amount of the original debt; and the defendants have pleaded in answer that the plaintiffs became parties to an agreement under the Bankruptcy Act, 1869, whereby a composition was to be accepted of 5*s.* in the pound, and joined in a resolution by which a trustee was appointed for the receipt of the composition on their behalf and on that of the other creditors, and that money was paid to the trustee equal to the amount of the composition to be paid to the plaintiffs and all the other creditors, and they say that under the circumstances the plaintiffs cannot sue, but their only remedy is against the trustee. The plaintiffs have replied that the amount of the composition was not paid or tendered to them within the time agreed upon in the resolution, and that the trustee, by the direction, request, and procurement of the defendants, has refused to pay it. Two questions were raised on those pleadings: one with regard to the facts of the case as a plied to the pleadings; the other on the demurrer to the replication.

With regard to the first question, I take the facts to be these. The plaintiffs were, I will take it, originally entitled to the amount sued for. A composition was proposed, and the defendants made a statement of their debts for the purpose of the proceedings in regard thereto. In that statement, though the amount of the bill was inserted, the defendants did not insert the names and addresses of the plaintiffs as creditors, and I will assume that the plaintiffs were not inserted or mentioned in any way. But at the first meeting of the creditors, or before the passing of the resolution for the acceptance of the composition, the plaintiffs came forward and made their claim in respect of the debt now

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sued for. They were thereupon admitted to the meetings, and treated as claiming to be creditors, and they attended and took part in the proceedings when the composition was agreed to and when the trustee was appointed, and they voted in respect of both the composition and the appointment of the trustee. Though their claim was so far admitted, the defendants did induce the trustee to put on the back of their proof the endorsement to which our attention has been called, objecting to the plaintiffs' proof in respect of the bill sued upon. This objection was not made known to the plaintiffs at the time. The plaintiffs agreed both to the acceptance of the composition and to the appointment of the trustee under the 279th rule. After the trustee was appointed, money was in his hands, the proceeds of defendants' estate, which was applicable to the payment of the composition, and which was sufficient to pay the whole of it, including the 5*s.* in the pound on the plaintiffs' claim. But the trustee, taking note of the objection made to the plaintiffs' claim, refused to pay the plaintiffs anything, and accordingly they bring this action.

It is argued for the plaintiffs that, inasmuch as their debt was not inserted in the statement of debts, they are not bound by the composition at all. It is said that they are not bound by virtue of the 126th section of the Bankruptcy Act because their names and addresses were not inserted in the statement, and so, if they are bound at all, it must be by virtue of a common law composition, and to constitute such a composition it must be shewn that the defendants agreed to pay a composition on an ascertained and specified debt; and, so far from that being so, it is said that it must be taken by reason of the indorsement on the statement of claim that the defendants declined to pay to the trustee any money to be held by him for the plaintiffs. The defendants, on the other hand, contend that the plaintiffs are bound by the composition under the 126th section of the Bankruptcy Act; that, although there is no statement of the names and addresses of the plaintiffs as creditors in the statement, yet as they did afterwards come in and make a claim, and did agree to take the composition, and concurred in the appointment of the trustee, and as sufficient money was in his hands applicable to the composition, if he had chosen to pay it, the plaintiffs were parties to the composition under the 126th section of the Act, and bound

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by it, and could not sue for their original debt on the ground that the trustee had not paid the composition. They contend that the endorsement on the claim was not a direction not to pay the composition, or if such a direction, that the trustee was bound to disregard it, and that it was his duty to pay.

2 C&D 338

Now the first part of the 126th section of the Bankruptcy Act, 1869, provides that the creditors may, without any proceedings in bankruptcy, by an extraordinary resolution, resolve that a composition shall be accepted in satisfaction of the debts due to them from the debtor, and the scheme of the earlier portion of the section appears to be that there may be a composition without bankruptcy proceedings, which, if effected in a manner specified, without any deed or release under seal, shall be effectual to discharge the bankrupt on payment of the composition. It seems to me that there may be two kinds of composition under the section; one where there is no trustee appointed, the other where there is a trustee. No mention is made of a trustee in the section itself. He is first introduced by the 279th rule; but there was power given by the statute to make rules to carry out the provisions of the statute, and the result seems to be that, under the statute and the rules, there may be a composition in which a trustee is appointed, as well as one where there is none. Again, it seems to me that there are two kinds of creditors who may be bound by a composition under the section; those who are bound because they have agreed to be bound, and those who are bound though they have not so agreed. If certain conditions are fulfilled, then unwilling creditors may be bound by compulsion; but it seems to me that the earlier part of the section applies also to creditors who voluntarily come in and agree to accept the composition. So creditors may agree to accept a composition either with or without the intervention of a trustee, and they may bind the recalcitrant creditors in either case. But if the non-assentients are to be bound, certain conditions must be fulfilled, and, amongst other things, it is provided that "the provisions of a composition, &c., shall be binding on all the creditors whose names and addresses, and the amount of the debts due to whom, are shown in the statement of the debtor, &c." I read that provision as applicable only to the case of persons who have not agreed to be bound, and not to the case of creditors who agree to accept the composition. The next paragraph of the section pro-

vides for the case of unknown holders of bills of exchange, and forms an exception to the preceding clause of the section; but neither of those clauses, in my view, apply to creditors who agree to be bound. It seems to me that the plaintiffs here cannot be said not to be parties to an agreement for a composition of 5*s.* in the pound under the 126th section of the Act. And they have also agreed to the appointment of Mr. Young as a trustee for the receipt and distribution of the composition.

The result seems to me to be that as soon as the trustee had in his hands an amount sufficient to cover the whole composition, and applicable thereto, the defendants were discharged from the original debt by the effect of the Act, and the plaintiffs cannot fall back upon that debt merely because the trustee has not paid the money over. It is argued that though this might be so, it is otherwise when the defendants have directed and procured the trustee not to pay it over. The jury have found that it was not by the direction, request, or procurement of the defendants that the composition was not paid to the plaintiffs. The trustee himself said in evidence that he did not act in not paying upon the objection indorsed on the claim. The finding of the jury may mean one of two things, either that the trustee acted on his independent judgment, or that the indorsement on the claim did not amount to a direction not to pay the money over. There is no motion on the ground that the verdict was against evidence, but it is said that the judge ought to have directed the jury to find that the replication, or so much of it as would be sufficient to answer the plea, was proved. Now if the mere fact of the non-payment of the composition had been a sufficient answer in law, then I think the judge ought to have so directed the jury. And so, also, if it can be said, as a matter of law, that this indorsement amounted to a direction not to pay the money over, then the finding would be wrong, though the question would still remain whether the replication is good. I think, however, that the jury were entitled, on the facts, to find either that the trustee did not act on the objection, or that it did not amount to a direction not to pay the composition, but only to an intimation to the trustee that if he thought fit he might inquire into the claim. I think it cannot be said that as a matter of law this indorsement amounted to a direc-

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tion not to pay the composition. It seems to me, on the contrary, that it is only a notice to the trustee that in the opinion of the debtor the amount of the claim might be objected to. But I go further, and say that even if it were a direction not to pay, according to the Act, the trustee ought to have disregarded it. The moment that the trustee had in his hands sufficient to pay the composition to all the creditors I think the composition was complete. He was bound to pay, and such a direction was futile as against the rights of the creditors, and the duty of the trustee was to hold the money for the creditors. So, even if there had been a direction on the part of the debtor, I think the non-payment of the composition would have been a default by the trustee, but it would not have remitted the creditor to his original debt. But, as I have said before, I do not think there was a direction, or that the judge was bound so to direct the jury. Therefore it seems to me that, according to the true construction of the Bankruptcy Act and the facts given in evidence, the plea was proved, and the replication was not proved, and the verdict must stand.

Then, with regard to the demurrer, it follows, from what I have before said, that the replication is bad. It admits that the trustee had money in his hands sufficient to pay the composition, and that the plaintiffs had agreed to the composition. It must be assumed on the demurrer that the refusal of the trustee to pay was the result of a direction given him by the defendants, but if I am right in holding that the trustee was not entitled to act on the direction, then, there being no allegation of any fraud in the transaction, the replication is insufficient, and, therefore, our judgment must be for the defendants on the demurrer.

With regard to the cases, I think that the decision in *Ex parte Peacock* (1), which was relied on for the plaintiffs, is not an authority in point. There is no statement in that case that the creditors agreed to the resolution accepting the composition. The attempt there was to bind the appellants as non-assenting creditors, and it is on this ground, as it appears to me, that Mellish, L.J., says that the doctrine of *Edwards* v. *Coombe* (2) applies. That case is no authority for the present, where there is a trustee appointed, and the plaintiffs are not dissentient creditors. With

(1) Law Rep. 8 Ch. 682. (2) Law Rep. 7 C. P. 519.

regard to the case of *Ex parte Botting* (1), the case before the Chief Judge in Bankruptcy, I agree that under the circumstances that is is not a binding authority upon us. The decision was not one which could have been appealed against, as there was a compromise, but still it is an intimation of opinion by a judge of great experience in such matters, and I agree with his view, that as the trustee in bankruptcy is a trustee, not for one creditor only, but for all, and also is a trustee for any surplus that may remain of the funds in his hands for the debtor, he has a right to examine into the amount of the debt. It is not, however, necessary to determine this question in the present case. With regard to *Ex parte Waterer* (2), it is not necessary to discuss the question there raised. It may be true that where the creditor has claimed for so much, and has been admitted so to claim without objection being made to him, no objection can be subsequently raised to his claim, and he is entitled to claim from the trustee the whole amount of his claim, but it does not follow that he can sue for his original debt if it is not paid. For the reasons I have given, I think our judgment must be for the defendants. My Brother Archibald, who has heard all the arguments, but has been obliged to leave the court, being engaged on business elsewhere, agrees in the result at which I have arrived, and substantially in the reasons which I have given.

LINDLEY, J. I am of the same opinion. The case for the plaintiffs has been put on two grounds: first, it is said that if the plaintiffs did agree to the composition they are not bound as though their names and addresses were known, and it was known that they were the holders of the bill; they were not mentioned in the debtor's statement. This argument is based on the 126th section of the Bankruptcy Act, 1869, and raises a not unimportant point. It is not free from difficulty, because the section uses both affirmative and negative words. It says that the provisions of a composition accepted, &c., shall be binding on all the creditors whose names and addresses, and the amount of the debts due to whom, are shewn in the statement of the debtor produced to the meetings, &c., but shall not affect or prejudice the rights of any other

(1) Law Rep. 19 Eq. 261. (2) 43 L. J. (Bankcy.) 25.

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creditors. It is contended that, though a creditor has agreed to the composition, and though everything else has been regularly done under the section, still if it happens that the name of such creditor was omitted from the statement, he is not bound. It appears to me that that contention goes too far. I think the true construction of the section is that adopted by my Brother Brett. There are two classes of creditors—assentient and non-assentient: those who are bound by reason of their assent, and those who do not assent, and it seems to me that the reasonable construction of the negative words in the section is that they apply only to the latter class. The second point is, that the plaintiffs did not agree to the composition, as they had agreed to certain terms, but the defendants agreed to other terms, and so in effect that the parties were not ad idem. To deal with that argument it is necessary to inquire what the terms were to which the plaintiffs assented. I apprehend that they assented, subject to the rules and practice which prevail with respect to matters of this description. If it is part of the law of composition, as the chief judge seems to have thought, that the claim of a creditor may be investigated before the composition is paid to him, then they assented subject to that right of investigation. If that right is not part of the law and practice of composition, then they assented to a composition without any such liability to investigation. If that be so, then the trustee was wrong in subjecting their claims to investigation, and they were entitled to the full amount of the composition on the whole of their claim. What, then, is the consequence of the trustee's refusal to pay them? It was urged on us that the consequence was that the plaintiffs were remitted to their right to sue for the original debt. I do not see that that follows. Reliance was placed on the indorsement of objection on the notice of claim. What was the effect of that indorsement? The debtor thought, rightly or wrongly, that there was ground of objection to the claim, and that he had a right to have it investigated, and, consequently, he objects to it and calls the attention of the trustee to his objection. If the result of the objection had been to exclude the plaintiffs from the benefit of the trust created in their favour, the plaintiffs' argument might have been well founded, but I apprehend that nothing of the kind results. A trust had been

created by what had been done at the meeting, and the plaintiffs became an object of that trust. The defendants' objection cannot exclude the plaintiffs from the benefit of that trust. There might be a question how much was payable to the plaintiffs as cestui que trusts, and whether they were entitled to the composition on the full amount of their claim or less, but the plaintiffs have not ceased to be cestui que trusts, and they are in a position to claim from the trustee the full benefit to which they are entitled. Money has been paid over to the trustee to the full amount of the composition, and was held by him for the benefit of all the creditors, including the plaintiffs. No case has been cited which shews that under these circumstances the creditor is entitled to throw the composition over altogether, and to revert to his original debt.

I agree, therefore, with the conclusions to which the rest of the Court have come on the facts.

Then with regard to the demurrer to the replication, if I rightly understand *Ex parte Waterer* (1), the effect of that decision is that the first part of the replication, which merely states that the composition has not been paid or tendered, would not alone be a sufficient answer to the plea, but the replication goes on to say that this was done by the direction, request, or procurement of the defendants. If the result of that was that the plaintiffs were not cestui que trusts under and entitled to the benefit of the composition, I should have thought that the replication was good, but it seems to me to amount only to a statement that, though the plaintiffs were cestui que trusts, the defendants told the trustee not to pay them. I do not see that the legal consequences of that is to defeat the composition. The result is that judgment will be entered for the defendants.

Judgment for the defendants.

Solicitors for plaintiffs: *Clarkes, Rawlins, & Clarke.*
Solicitors for defendants: *Nicol, Son, & Jones.*

(1) 43 L. J. (Bankcy.) 25.

1876
May 4.

HAWKINS *v.* WALROND AND ANOTHER.

Landlord and Tenant—Distress—Sale of Goods distrained—Failing to sell for the best Price—Covenant to consume Hay, &c., on the demised Premises—Illegal Restriction on Sale—2 Wm. & M. c. 5, s. 2—56 Geo. 3, c. 50, s. 11.

A lease of a farm contained a covenant by the tenant not to remove hay, unthreshed corn, &c., from the demised premises, but to use them for the improvement of the land.

The landlord having distrained hay and unthreshed corn for rent in arrear, sold the distress under a condition that the purchaser should consume the matters sold on the premises, and consequently the best price was not obtained in accordance with 2 Wm. & M. c. 5 :—

Held, that the landlord could not legally sell under such a condition.

The 56 Geo. 3, c. 50, s. 11, does not apply to a sale by a landlord of a distress.

STATEMENT of claim stated that the defendants had seized and sold certain hay and unthreshed corn of the plaintiff's, who had been a tenant to one of the defendants of a certain farm, as a distress for rent, and had sold the same under an illegal and improper condition that they should be consumed on the premises, and by reason thereof had failed to obtain the best price that could be gotten for the said hay and corn, contrary to the statute in such case made and provided.

Demurrer on the ground that it was not shewn that the said condition was illegal. It was agreed by the parties that the covenants of the lease might be referred to, though not set out on the record. There was in the lease the ordinary covenant by the tenant not to remove hay, unthreshed corn, &c., or to sell or dispose of them off the premises, but to use them for the improvement of the land demised. (1)

R. S. Wright, for the defendants, in support of the demurrer,

(1) The 56 Geo. 3, c. 50, s. 11, enacts that "no assignee of any bankrupt . . . . nor any assignee under any bill of sale, nor any purchaser of the goods, chattels, stock, or crops of any person or persons engaged in husbandry on any lands let to farm, shall take, use, or dispose of any hay, straw, &c., or any manure, &c., or other dressings intended for such lands, and being thereon in any other manner and for any other purpose than such bankrupt . . . . or other person so employed in husbandry ought to have taken or disposed of the same, if no commission of bankruptcy had issued, or no such assignment or assignments had been executed or sale made."

referred to *Abbey* v. *Petch* (1), *Ridgway* v. *Lord Stafford* (2), *Wilmot* v. *Rose* (3), and contended that 56 Geo. 3, c. 50, s. 11, enabled the landlord to impose this condition on the sale, notwithstanding 2 Wm. & M. c. 5, s. 2.

Arthur Wilson, for the plaintiff, in support of the statement of claim, was stopped by the Court.

LORD COLERIDGE, C.J. The plaintiff, who was tenant to one of the defendants of a farm, complains that the defendants (one of whom was the landlord, and the other the bailiff authorized by him), having distrained certain hay and unthreshed corn, sold it under an illegal and improper condition that it should be consumed on the premises, and so did not obtain the best price that could be obtained. To this claim the defendants have demurred, and it is to be taken for the purposes of our decision that the covenant of the lease relied on by the defendants appears upon the record. That covenant is a covenant on the part of the tenant that he will not carry away from the premises, or sell or dispose of, any hay, unthreshed corn, &c., but will use the same on the premises for the improvement thereof. It is upon that covenant, and the 11th section of 56 Geo. 3, c. 50, that the defendants rely.

The defendants, in effect, say that though the hay, &c., was sold for less than it would have fetched apart from any restriction under the covenant, the covenant was one that bound the purchaser, and that the purchaser only undertook to do what the plaintiff was bound to do. They say that, as no purchaser could dispose of the hay otherwise than on the premises, they had a right to sell subject to the obligation so to dispose of it. This contention depends on the true construction of the 11th section of 56 Geo. 3, c. 50. It is argued that that is a general enactment, and that as by that enactment no purchaser of the hay, &c., could have used it otherwise than the tenant could have used it, and the landlord by the condition only bound the purchaser so to use it, the tenant suffered no wrong, as the sale was for the best price that under that restriction could be obtained. The question is, whether

(1) 8 M. & W. 419. (2) 6 Ex. 404; 20 L. J. (Ex.) 226.
(3) 3 E. & B. 563; 23 L. J. (Q.B.) 281.

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that is the true construction of the section, and I think that it is not. The power of sale is comparatively a recent incident in the history of the law of distress. It did not exist at common law, but is a statutory power, and must be exercised subject to the conditions imposed by the statute creating it. The power of sale must still be exercised according to the statute 2 Wm. & M., sess. 1, c. 5, s. 2, which enacts that the goods distrained may, after appraisement, be sold for the best price that can be gotten for the same. The landlord must sell subject to the conditions of the statute, and cannot impose on the sale any conditions which must necessarily prevent the goods from being sold at the best price which can be gotten for the same. That statute is a distinct enactment dealing with the case of sales under distress, which 56 Geo. 3, c. 50, does not. The object of the latter statute is wholly foreign to the question of sales by landlords. Though perhaps its mere language, considered apart from the history of the legislation on these subjects, is capable of being construed so as to apply to sales under a distress by landlords, and might include the present case, still, having regard to the object aimed at, it appears to me that the terms of the 11th section are sufficiently satisfied by confining their application to purchasers from tenants. The decisions are in favour of the view we take. The case of *Abbey* v. *Petch* (1) is to the contrary, but it does not seem that the terms of the statute 2 Wm. & M., c. 5, were there referred to, and, although the point was a new one, the rule was refused. But that decision came under review in the case of *Frusher* v. *Lee* (2), when the same court—the Court of Exchequer—thought the question still an open one; and in *Ridgway* v. *Lord Stafford* (3), a case exactly on all-fours with the present, the same Court decided that the landlord cannot under these circumstances sell under a condition such as this. The decisions being in conflict, we should be entitled to follow the later decision, especially as it was given by the same Court as decided the former case. But it is suggested that the case of *Wilmot* v. *Rose* (4) has thrown some doubt on the decision in *Ridgway* v. *Lord Stafford.* (3) That was not a case of a sale under a distress, but an ordinary sale off the premises by a tenant

(1) 8 M. & W. 419.
(2) 10 M. & W. 709.
(3) 6 Ex. 404; 20 L. J. (Ex.) 226.
(4) 3 E. & B. 563; 23 L. J. (Q.B.) 281.

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in fraud of a condition to the contrary in his lease. The purchaser, in defiance of notice of the condition from the landlord, sold the goods, and was sued by the landlord. It was argued for the defendant, that as the title of 56 Geo. 3, c. 50, and the preamble referred only to stock taken in execution, the words "nor any purchaser," in the 11th section, must be taken to be confined to purchasers under an execution. The Queen's Bench very properly held that the generality of the words in the 11th section could not be restrained by reference to the title or preamble, but that all purchases from the tenant were included.

But in the report of the case in Ellis and Blackburn's Reports, what Lord Campbell and Crompton, J., said may be construed as meaning that the case of *Ridgway* v. *Lord Stafford* (1) would have been an authority for the case before them if it had not been that 56 Geo. 3, c. 50, s. 11, had not been brought before the notice of the Exchequer in that case. It would follow, if so, that they did not think *Ridgway* v. *Lord Stafford* (1) a binding authority, because the Court of Exchequer did not decide it on the proper materials. But the cases are altogether distinguishable on the ground I have pointed out, namely, that in one case the purchase was from the tenant, and the statute enacts that the purchase from the tenant shall be subject to the conditions of the lease, and in the other case the purchase was from the landlord. I find that it appears from the report of the case in the Law Journal that Crompton, J., took this very distinction, and it therefore appears, when we look to the real meaning of the language used by the Court, that it was on the ground of this distinction that they held *Ridgway* v. *Lord Stafford* (1) not an authority for the case before them. *Wilmot* v. *Rose* (2) is therefore not in conflict with *Ridgway* v. *Lord Stafford.* (1) Therefore, on the ground of authority as well as the construction of the statutes, I am of opinion that our judgment should be for the plaintiff.

ARCHIBALD, J. The question that arises is shortly this: whether the statute 56 Geo. 3, c. 50, so far qualifies 2 Wm. & M. c. 5, as to make this a legal and proper condition for the landlord to impose when selling the distress. I agree with what my

(1) 6 Ex. 404; 20 L. J. (Ex.) 226. (2) 3 E. & B. 563; 23 L. J. (Q.B.) 281.

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Lord has said as to the history of distress. And it is clear that, in the absence of anything to qualify the provision of 2 Wm. & M. c. 5, that the distress shall be sold for the "best price," it would be illegal for the landlord to sell under such a condition as this. Now it does not appear to me that 56 Geo. 3, c. 50, does qualify the earlier statute. It was passed in relation to a totally different object, and had no reference whatever to sales by landlords.

The defendants' contention is based on the words "nor any purchaser" in the 11th section. It seems to me that, having regard to the object of the statute, those words are fully satisfied by holding them to refer to purchasers from the tenant, and that they were not intended to qualify the provisions of the former statute. The current of authority seems to be in favour of that view, and the reasoning of the decision in *Ridgway* v. *Lord Stafford* (1) shews very clearly how almost impossible it would be to make a condition of this kind binding upon a purchaser from the landlord under a distress. Some difficulty was suggested as arising from the case of *Wilmot* v. *Rose*. (2) But, properly understood, the decision in that case has no bearing whatever on the present. The question raised in that case was whether 56 Geo. 3, c. 50, s. 11, was confined to purchasers under an execution or assignees in bankruptcy, and it was held that the generality of the words "nor any purchaser" could not be restrained by reference to the preamble. But there is nothing in that decision to shew that the words include a purchaser from the landlord, and the grounds of the decision are clearly limited to purchasers from the tenant. The case of *Ridgway* v. *Lord Stafford* (1) was referred to in the argument, and it was said to be no authority for the case under discussion; but it it is clear, from the report in the Law Journal, that this was on the ground that the statute 56 Geo. 3, c. 50, had nothing to do with sales of goods distrained by the landlord. Therefore, it seems to me that the landlord is still bound to sell for the best price, in accordance with the terms of the statutory authority given by 2 Wm. & M. c. 5.

LINDLEY, J. I am of the same opinion. Unless some sub-

(1) 6 Ex. 404; 20 L. J. (Ex.) 226. (2) 3 E. & B. 563; 23 L. J. (Q.B.) 281.

sequent statute has modified the provisions of 2 Wm. & M. c. 5, the landlord, deriving his authority to sell solely from that statute, must exercise that authority in conformity with the terms of the statute, and sell for the best price, without imposing any restriction such as is now before us.

The defendants rely on the covenant and on 56 Geo. 3, c. 50, s. 11. The covenant is a covenant by the tenant for the landlord's benefit, which the landlord can enforce by action or injunction against the tenant or purchaser with notice. It being for the landlord's benefit, it follows that the landlord can enforce or waive it at his option. But if he chooses to distrain and to sell, he cannot escape from the statutory obligation to sell at the best price, because he could have prevented the tenant from disposing of the subject-matter of the sale. If he chooses to exercise that statutory power, he in effect waives the condition. If the statutory authority and the covenant conflict, so much the worse for the landlord. I cannot think that the language of 56 Geo. 3, c. 50, shews any intention to modify the law of distress. The Act is directed to a wholly different object, and the general words "any purchaser" must be construed, I think, with reference to that object, and in connection with what goes before. So construed, I think it is clear that "any purchaser" means any purchaser ejusdem generis with the persons mentioned before in the section, and does not include a purchaser under a distress from the landlord. The authorities, with the exception of *Abbey* v. *Petch* (1), are all one way. The decision of *Wilmot* v. *Rose* (2) has, in my opinion, nothing to do with the present case. For these reasons, I think our judgment should be for the plaintiff.

Judgment for the plaintiff.

Solicitors for plaintiff: *Church & Clarke.*
Solicitors for defendants: *Walker & Martineau.*

(1) 8 M. & W. 419. (2) 3 E. & B. 563; 23 L. J. (Q.B.) 281.

1876
May 10.

[IN THE COURT OF APPEAL.]

LE BLANCHE *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Railway Company—Liability for Want of Punctuality—Measure of Damages—Special Train.

The plaintiff took a ticket for Scarborough at the defendants' station at Liverpool. The journey from Liverpool to Scarborough is viâ Leeds and York. The defendants' train only goes to Leeds; and from Leeds to Scarborough the journey is over the lines and by the trains of other companies. The ticket referred to the conditions in the defendants' published time bills, of which the most material part was as follows: "The published train bills are only intended to fix the time at which passengers may be certain to obtain tickets for any journey from the various stations, it being understood that the trains shall not start before the appointed time. Every attention will be paid to insure punctuality, so far as it is practicable; but the directors give notice that the company do not undertake that the trains shall start or arrive at the time specified in the bills, nor will they be accountable for any loss, inconvenience, or injury which may arise from delays or detention. . . . The granting of tickets to passengers to places off the company's line is an arrangement made for the convenience of the public; but the company do not hold themselves responsible for any delay, detention, or other loss or injury whatsoever arising off their lines, or from the acts or defaults of other parties, nor for the correctness of the times over lines of other companies, nor for the arrival of this company's own trains in time for the nominally corresponding train of any other company or party."

The train by which the plaintiff travelled was too late at Leeds to catch the train by which the plaintiff should have proceeded to York; and when the plaintiff did arrive at York, at about 7 p.m., he found that the train for Scarborough which he should have caught had gone, and that the next train for Scarborough did not start till 8 p.m., arriving at about 10 p.m. He thereupon took a special train from the North Eastern Company, which arrived at Scarborough between 8.30 and 9 p.m. The plaintiff had no business or engagement in Scarborough necessitating his being there at any particular time.

The plaintiff brought an action against the defendants in the county court, and the county court judge held that there was a contract on the defendants' part to use due diligence to insure punctuality, and that, upon the facts, there had not been such diligence used. He also held that the plaintiff was entitled to recover the cost of the special train on the authority of the dictum of Alderson, B., in *Hamlin* v. *Great Northern Ry. Co.* (26 L. J. (Ex.) 22), that "where one party to a contract does not perform it, the other may do so for him as near as may be, and charge him for the expense incurred in so doing."

On appeal to the Court of Common Pleas, that Court affirmed the judgment of the county court judge. On appeal from that decision to the High Court of Appeal:—

Held (reversing the decision of the Common Pleas), that the county court

judge was wrong in acting on the dictum above mentioned as an absolute rule. The principle is, that if one party does not perform his contract, the other may do so for him as reasonably near as may be, and charge him for the reasonable expense incurred in so doing; and a proper test of what is reasonable in such a case as the plaintiff's is to consider whether, according to the ordinary habits of society, a person delayed on his journey, under circumstances for which the company were not responsible, would have incurred the expenditure in question on his own account:

Held, also, by the majority of the Court (James and Mellish, L.JJ., Baggallay, J.A., and Mellor, J.), that the words "Every attention will be paid to insure punctuality as far as practicable" did import a contract to use due attention to keep the times specified in the time bills as far as practicable, having regard to the necessary exigencies of the traffic and circumstances over which the company had no control.

Per Cleasby, B. The effect of the conditions was that the company declined to enter into any contract as to the times specified in the time bills, whether absolute or qualified.

Per Baggallay, J.A. The contract in the conditions was such as to protect the defendants from any further liability in a case where they issued a through ticket than they would have incurred if they had only issued a ticket to the farthest point of the journey on their own system.

Per James, L.J. The true meaning of the contract was, that the persons in the management of the train would, with regard to the particular train on that particular journey, use due attention to insure punctuality, but that the defendants were not to be held responsible for delays arising from circumstances unconnected with the management of the particular train.

APPEAL from a decision of the judge of the Bloomsbury county court.

1. The plaintiff is a ship-broker carrying on business in London, and the defendants are the London and North Western Railway Company.

2. The action was brought to recover 11*l.* 10*s.*, being the cost of a special train taken by the plaintiff under the circumstances hereinafter mentioned.

3. The cause was heard on the 20th of November, 1874, before the judge, without a jury.

4. The following facts are not in dispute: On the 18th of August, 1874, the plaintiff, travelling with a friend, Mr. Bigland, took a first-class ticket at the defendants' station at Lime Street, Liverpool, by the 2 p.m. train for Scarborough, viâ Eccles, Staleybridge, Huddersfield, Leeds, and York. The ticket had indorsed upon it the words "Issued by the London and North Western Railway Company subject to the company's regulations and to the

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conditions of the time tables of the respective companies over whose lines this ticket is available."

The times of that train, as shewn by the time-tables of the defendants, and which were in evidence, were as follows:—Leave Liverpool, Lime Street, 2 p.m.; Edge Hill, 2.7; St. Helen's Junction, 2.26; Newton Bridge, 2.35; Ordsall Lane, 3.0; arrive Manchester, 3.5; leave Manchester, 3.20; Ashton, 3.38; arrive Staleybridge, 3.43; leave Staleybridge, 3.47; Huddersfield, 4.17; Mirfield, 4.29; Dewsbury, 4.38; Batley, 4.42; arrive Leeds, 5.0; leave Leeds, 5.20; arrive York, 6.5; Scarborough, 7.30.

The conditions referred to were, so far as they are material for the present case, in the words and figures following:—

The arrival time denotes when the trains may be expected; but the passengers, to insure being booked, should be at the principal stations five minutes earlier, and the intermediate stations ten minutes earlier. The doors of the booking-office will be closed punctually at the hours fixed for the departure of the trains, after which no person can be admitted.

Time Bills.—The published train bills of this company are only intended to fix the time at which passengers may be certain to obtain their tickets for any journey from the various stations; it being understood that the trains shall not depart before the appointed time. Every attention will be paid to insure punctuality as far as it is practicable; but the directors give notice that the company do not undertake that the trains shall start and arrive at the time specified in the bills; nor will they be accountable for any loss, inconvenience, or injury which may arise from delays or detention. The right to stop the trains at any station on the line, though not marked as a stopping station, is reserved.

The granting of tickets to passengers to places off the company's line is an arrangement made for the convenience of the public: but the company do not hold themselves responsible for any delay, detention, or other loss or injury whatsoever arising off their lines, or from the acts or defaults of other parties, nor for the correctness of the times over the lines of other companies, nor for the arrival of this company's own trains in time for the nominally corresponding train of any other company or party.

5. The plaintiff and Mr. Bigland stated that, having taken tickets, as mentioned in paragraph 4, the train left Liverpool two or three minutes after 2 p.m., and arrived at Leeds about 5.27 p.m. [It was admitted that the train was 27 minutes late at Leeds]; and that, on arriving at Leeds, they found that the train of the North Eastern Railway Company, by which they would in the ordinary course have proceeded, had left Leeds, the time fixed for its departure being 5.20 p.m. They therefore proceeded to York by the next train, which left Leeds at 5.55 p.m., and arrived at

York at 7 p.m., where it stopped. On inquiry, they found that the next train from York to Scarborough would not leave until 8 p.m., and was timed to arrive at Scarborough at 10 p.m. Thereupon they took a special train from York to Scarborough, and arrived there between 8.30 and 9 p.m. If the plaintiff had been able to catch the 5.20 North Eastern train at Leeds, he would in the ordinary course have arrived at Scarborough at 7.30 p.m.

Neither the plaintiff nor Mr. Bigland had any business or engagement whatever necessitating his arrival at Scarborough at any particular time.

In his evidence,—which was admitted, subject to objection by the counsel for the defendants,—the plaintiff, speaking of what had passed at Manchester, stated as follows:—"My friend spoke to the London and North Western guard. I do not know whether he was the guard of the train; but he was on the platform regulating the trains, holding up his hand when we started. I heard my friend ask the guard, 'Why are we detained?' The guard replied that some train had arrived with passengers, the passengers of which train ordinarily went on by a later train, and there was delay in putting on carriages to take those passengers on by our train. That is my impression and recollection of the words. It is the substance of what took place. We were delayed as near as possible half an hour,—twenty-five to thirty minutes;" and in his cross-examination (looking at a witness for the defendants, named Blomerley), he said: "I think that is not the man. I cannot say whether I should identify him."

Mr. Bigland, upon the same point, in his evidence stated that he had a conversation with the guard, and that the plaintiff had correctly stated that conversation; and, on cross-examination on the point, he said that he could not identify the guard, but knew he was a guard by his dress; that he did not know how many guards there were of the train; and that the guard told him that, "if we had been sent on at the proper time, we should not have taken the passengers then coming in, and who were expected to go by the following train;" that the extra delay was, to have extra carriages put on. Mr. Bigland added that he could not say what train was referred to, or anything more about it, he had made no inquiries whether there was any such train; that he

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could not identify the man. On his re-examination, he said he did not take notice if the man gave directions as to the train; that he saw the passengers coming along the platform; that there was delay in putting on carriages; that he did not know where the passengers came from; but that they came from an entrance on the right hand side, and he saw them passing along past the carriage he and the plaintiff were in.

6. Upon this evidence, the counsel for the defendants submitted that the plaintiff ought to be nonsuited, on the ground that there was no evidence of negligence or of any breach of duty by the defendants or of the contract entered into in the ticket coupled with the conditions. But the learned judge declined to nonsuit, and said he would hear the whole of the evidence, and give the defendants leave to appeal upon the question whether or not he ought to have nonsuited the plaintiff.

7. The defendants called, among other witnesses, Mr. Fourdrinier, the chief assistant to the general passenger superintendent, who described the line over which the defendants' train had to run in passing from Lime Street, Liverpool, on to Leeds. He proved that, after leaving Liverpool, the train ran for 31½ miles over the line of the defendant company to Victoria Station, Manchester, where it came upon the line of the Lancashire and Yorkshire Railway Company. The signals for the admission of the train on to the line of the Lancashire and Yorkshire Company were regulated by and under the sole control of the Lancashire and Yorkshire Railway Company's servants. From Victoria Station, Manchester, the train ran for 8 miles over the line of the Lancashire and Yorkshire Railway Company to Staleybridge Junction, where it entered on the line of the Manchester, Sheffield, and Lincolnshire Railway Company; the signals regulating the admission of the train being under the sole control of the servants of the Manchester, Sheffield, and Lincolnshire Company. From Staleybridge Junction it ran for 17 chains over the line of the Manchester, Sheffield, and Lincolnshire Railway Company, and through Staleybridge, a station under the control of the Manchester, Sheffield, and Lincolnshire Company's servants. On leaving the Manchester, Sheffield, and Lincolnshire line, the train ran for 21½ miles over the the defendants' line to Heaton Lodge

Junction, where it came upon the line of the Lancashire and Yorkshire Railway Company, over which it ran for a distance of 2½ miles to Dewsbury Junction, which 2½ miles were under the sole control of the Lancashire and Yorkshire Company's servants. On leaving Dewsbury Junction, it ran for 8¾ miles over the line of the defendants to Whitehall Junction, from which place it ran over the line of the Midland Railway Company a distance of 16 chains, which 16 chains were under the sole control of the Midland Railway Company's servants. From thence, it ran over the line of the defendants for 29 chains into the station of the defendants at Leeds. At each point where the train entered the line of another company, the signals are under the sole control of the servants of the company whose line is entered. Mr. Fourdrinier also stated that the times given in the company's time tables for the expected arrival and departure of trains were prepared in the office of the chief passenger superintendent, and under his supervision.

8. The counsel for the defendants then proposed to ask the witness whether it was or was not possible, having regard to the nature of the traffic on such a line as this, to run trains so as to keep punctually their appointed time. The question was objected to by the counsel for the plaintiff, and was rejected by the learned judge, who, however, reserved to the defendants the question whether or not he ought to have admitted the evidence.

In cross-examination by the plaintiff's counsel, this witness stated that it was customary in his department, in fixing the time of arrival of trains, to bring experience to bear in providing for ordinary delay, and to take into consideration contingencies arising from passing junctions and running over lines under the control of other companies; and that such times were fixed after consultation with such other companies.

9. Blomerley, the principal guard of the train, which is called the Leeds Express, gave from his book the times of arrival and departure at and from the different stations upon the journey in question, shewing a loss of 2 minutes in starting from Liverpool, 3 more in starting from St. Helen's Junction, 5 more at Ordsall, and 5 more at Manchester, and, upon the whole journey from Liverpool to Leeds, a loss of 27 minutes,—the train arriving at

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Leeds at 5.27 p.m. instead of 5.0; the train for Scarborough (a North Eastern train) leaving Leeds at 5.20. He denied that he had had any conversation with any of the passengers as to the cause of the delay, or that there was longer detention at any of the stations than was necessary to get the passengers in. But he admitted, on re-examination, that the trains had not been punctual on any day during that week.

10. Upon this evidence, the defendants' counsel submitted that the defendants were entitled to judgment, on the following (among other) grounds, in addition to those already mentioned in paragraph 5 of the case:—1. That it was clearly shewn that the delay was not occasioned by the defendants' negligence. 2. That the conditions hereinbefore set out protected the defendants from responsibility for delay occasioned by causes other than the negligence of their own servants. 3. That the delay which in fact caused the train to arrive too late to catch the North Eastern train at Leeds, was proved to have been occasioned by the acts of persons over whom the defendants had no control. 4. That the defendants were protected by the terms of the above conditions from the consequence of the train failing to arrive in time for the plaintiff to catch the North Eastern train.

11. The counsel for the defendants further contended that the damages claimed by the plaintiff were too remote, and that the plaintiff was only entitled to nominal damages, or, at most, to such damages as the learned judge might think fit to award to the plaintiff for being prevented from arriving at Scarborough until 10 p.m. instead of the time at which he would have arrived had the 2 p.m. train from Liverpool kept the published time, viz. 7.30 p.m.

12. It was contended, on the other hand, on the part of the plaintiff, that the defendants were guilty of negligence in failing to start the train punctually from Liverpool, and in keeping the booking-office open until the time fixed for the departure of the train; that the delays which subsequently occurred might have been foreseen and prevented; and that the defendants were not protected from the consequences of such delays by their regulations and conditions, inasmuch as such regulations and conditions could only apply to causes over which the defendants had no

control; and, further, if it were necessary so to contend, that, notwithstanding the conditions, the defendants must be held liable for the negligence of companies over whose lines they had running powers; but that it was not necessary to raise this question, as there was sufficient evidence of negligence of the defendants on their own line: and, lastly, as to damages, that the plaintiff was entitled to the cost of the special train, as he was justified in completing the contract which the defendants had failed to perform.

13. The judge took time to consider; and on the 4th of December, 1874, gave the following judgment in favour of the plaintiff, for the full amount claimed:—

This is an action by a gentleman who was a passenger on the defendants' railway, the London and North Western Railway, to recover damages for the alleged negligence of the company, in not keeping time. On the 18th of August last, the plaintiff, wishing to go from Liverpool to Scarborough, went to the London and North Western Station at Liverpool and took a first-class ticket there to Scarborough by the train which, according to the company's tables, was to leave Liverpool at 2 in the afternoon and arrive at Scarborough at half-past 7. The train was called the Leeds Express Train. The London and North Western Company issued a through ticket, which is issued by the London and North Western Railway Company, subject to the company's regulations and to the conditions in the time tables of the respective companies over whose lines this ticket is available.

The whole of the line is not on the London and North Western Railway; but, to Manchester, 31½ miles, it is their own line. There the defendant company run on the Lancashire and Yorkshire, and then on the Manchester, Sheffield, and Lincolnshire, and then again on their own line; then again on the Lancashire and Yorkshire; then again on their own line; and (whether for a short distance on the Midland before arriving at Leeds, I do not know) from Leeds, on the North Eastern Railway, through York, to Scarborough.

The train started from Liverpool 3 minutes late, and it lost time on its way to Manchester, where it arrived 13 minutes late, viz. 3.18 p.m., instead of 3.5. The proper time to leave Manchester was 3.20; but in fact they did not leave until 3.35, so that 15 minutes were lost there. Something was said about its being 17 minutes, but I cannot find that in the evidence of the guard; the difference is only between 15 minutes and 17 minutes, viz. 2 minutes. Between leaving Manchester and reaching Leeds more time was lost, and the train reached Leeds at 5.27, instead of at 5, or 27 minutes late. From Leeds, the on train was, as I have said, a North Eastern train, and the plaintiff missed that on train. It was to start, according to the time tables issued by the London and North Western Railway Company, at 5.30, and had gone 7 minutes. The plaintiff had therefore to wait until the next train, which started at 5.55, to reach York at 7. If the proper train had not been missed at Leeds, the plaintiff would have reached York at 6.5; but in fact he did not arrive there until 7. There

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was no train on until 8, by which, if it kept time, he would have reached Scarborough at 10. The plaintiff considered that he was much ill treated by the company, who, having agreed that he should reach Scarborough at 7.35, proposed that he should not reach it until 10; that this was the result of their negligence, not of any circumstances which were beyond their control; and that it was a breach of contract; and he therefore ordered a special train on to Scarborough (where he arrived at 8.30), for which train he paid 11*l.* 10*s.* He now sues the London and North Western Railway for damages for breach of their contract, claiming that 11*l.* 10*s.* as the damage he has sustained. The grounds of the defence are,—first, that there was no unreasonable delay,—and, secondly, even if there were, having regard to the contract with the plaintiff, the company are not liable.

I think there was an unreasonable delay. It must be assumed that the time published by the company in their time tables is the time which the company consider to be a reasonable time, that is to say, the time in which, apart from any unusual circumstances, the journey can be well performed. Now, in this case, there were no such unusual circumstances shewn; and, on the contrary, there is evidence of time lost on more than one occasion simply by what I am obliged to consider to be on the part of the company, and in the words of the condition, "a want of attention to insure punctuality." Such was the keeping the doors open at Liverpool to the last moment for passengers, and thus delaying the train and the passengers who were punctual, to enable passengers who were not punctual, but who had come late, to join the train with their luggage. Such also was the delay at St. Helen's Junction, occasioned by the shunting of a goods train belonging to the defendant company at the time this train was due, and which stopped this train at that station. Such was the delay at Ordsall Lane for a local train of the defendants: and such also the delay at Manchester, to put on an extra carriage, in order to take passengers who, had the train not been late, would have gone by the next train, at 3.50. The loss at each of these places was very trifling, but in the aggregate it amounted to 15 minutes in a run of 1 hour and 5 minutes, or nearly one-fourth more than the published time. Probably no one would complain of such a loss of time, if the journey had ended at Manchester: but by this delay, unfortunately, the on train from Leeds was lost, and that loss occasioned a further delay, and then the on train from York was lost, which occasioned still further delay. Thus, this apparently small loss of 15 minutes at Manchester was sufficient to lead to a delay of 2½ hours in reaching Scarborough, viz. arriving at 10, instead of 7.30, or a journey of 8 hours instead of a journey of 5½ hours.

Now, there is no sufficient explanation given of the delays between Liverpool and Manchester which I have mentioned. The wish to give the greatest possible accommodation to the greater number of the public may have led to a part of the delay; and the pressure of the regular or ordinary traffic, distinguished from anything unusual, may have been such as to have also contributed to the delay: but I hold that these circumstances, if existing, are no sufficient answer to one in the position of the plaintiff. I fear, upon the evidence, that the truth is that, in the published time tables, sufficient time is not allowed for the regular and ordinary traffic; and I am of opinion that in this case proper attention was not paid to insure to the plaintiff punctuality, in other words that there was negligence on the part of the company and their servants.

The second ground is that the company are relieved, by reason of the conditions,—that, having regard to their contract, they are exempt from liability. I stated in the course of the argument that I held that the plaintiff is bound by these conditions, although, as he stated, he in fact knew nothing about them. They are referred to on the company's ticket (1), and they bind him. I also held, on the construction of this condition, that the words "every attention will be paid to insure punctuality," would cover all the rest, so far, at all events, as the line of the London and North Western Railway Company is concerned. I cannot do better than read, upon the construction of the agreement, my judgment on a former case in which I had to give judgment against the London and North Western Railway Company on the 5th of March, 1874, which was to this effect: —"Apart from authority, I am of opinion that it is not the true construction of the contract that the company can be relieved from the [consequences of the] negligence of their own servants. I think that the contract bound the company to this, that every attention would be paid to insure punctuality as far as practicable; and I think also that that must include every attention on the part of the company's servants: and I read the rule to be, that, subject to every attention being paid by the company and their servants to insure punctuality as far as is practicable, the company do not undertake that the train should arrive at the time stated, and will not be accountable for any loss, inconvenience, or injury which may arise from delays; and that, subject as before, the company do not hold themselves responsible for the arrival of this company's trains in time for the nominally corresponding trains of any other company. It is true that the latter part of the rule is introduced by the word 'but': and the argument for the company is, that the true construction of the whole sentence is, that the latter part accompanies the former as a limit to it, or an exception. But I think that less violence is done to the sentence by construing it not to relieve the company from their own negligence, than by construing it to mean that every attention will be paid to insure punctuality, but we do not bind ourselves to it, and we are at liberty to neglect that and pay no attention at all. The company's construction makes the sentence contradictory in itself. I think also the public have a right to say, if a company intends to be protected against their own negligence, they should say so."

Now, I have already shewn that, in my judgment, there was negligence on the part of the company in this case; and I hold that the condition affords no defence to that negligence. I have purposely avoided any reference to any delay off the company's own line. The arguments of Mr. Russell and the facts of this case shew how grievously inconvenient to the public it would be if that condition, that the company will not be responsible for any delay off their own line, was held to be a legal condition. But, if I were called upon to decide it, I do not at present see my way to holding that the condition is not legal. In the view I take of the facts of this case, however, I am not called upon to decide the point. The delay up to Manchester, which was clearly on their own line, was sufficient to lose the on train, which occasioned the subsequent delay in arriving at York. There must, therefore, be judgment for the plaintiff.

The question then arises as to the amount of damages,—whether it is to be

(1) See *Henderson* v. *Stephenson*, Law Rep. 2 H. L., Sc. 470.

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nominal damages or more than nominal damages; and I am of opinion that the plaintiff is entitled to more than nominal damages, viz. to the 11*l.* 10*s.*, the costs of the special train. In contract (not in tort), a man can recover only such money damage as he can prove to have been occasioned by the breach of the contract; whatever annoyance or whatever inconvenience he may have suffered, he cannot in a case of contract recover any damages for that, he is strictly confined to money damages. The plaintiff in this case sustained no money damage by the delay, except it be the cost of the special train. Had he gone on from York by the eight o'clock train, and arrived at Scarborough at ten, instead of half-past seven, he could not have shewn any pecuniary damage; but he said, "I wish to be taken on by a special train, and I am entitled therefore to be paid that expense;" and in principle I think he is. I cannot better state the principle than in the words of Alderson, B., in *Hamlin* v. *Great Northern Ry. Co.* (1) That was a case in which there was no on train for the plaintiff, and he was delayed that night at the place; but, in the course of the argument, Alderson, B., said: "The principle is, that, if the party does not perform his contract, the other may do so for him as near as may be, and charge him for the expense incurred in so doing." Then, with reference to the particular case before him, he said that the plaintiff might have taken a post-chaise, and charged it. This was in the year 1856, where Alderson, B., lays down specifically what he considers the principle where a man is suing for breach of contract. That is, in truth, not a novel principle; it is familiar to us all in cases of contract for work and labour. Under the circumstances, I think that principle governs this case. Now, I do not mean to say that it is every trifling delay that would justify a refusal to wait; on the other hand, it is equally obvious that a train might be so delayed as to make it quite justifiable that a passenger should refuse to wait. A passenger might arrive at twelve at noon, and be asked to wait till eleven at night. That would of course be out of the question. It must, therefore, be to a certain extent a question of degree in each case; and I think that the difference in the case between a journey of five and a half hours and a journey of eight hours is a substantial difference, and such as in law (whatever otherwise may be thought of it) to justify the taking a special train; and, if so, the plaintiff is entitled to charge for it. I do not hesitate to say that, on the question of damages, I have had great difficulty in arriving at a judgment. The cases are very bare indeed of authority; and this is a mere dictum of Alderson, B., which is not to be found, I believe, in the other reports of *Hamlin* v. *Great Northern Ry. Co.* (1) Still it is found in the Law Journal; and it is consistent, as I have said before, with the principle which is quite familiar to us in cases of contract. Therefore, though I freely admit that I have felt great doubt on the matter, I have come to the conclusion that I am bound by the principle enunciated by Alderson, B., and therefore I give judgment for the plaintiff for 11*l.* 10*s.*

The questions for the opinion of the Court were,—1. Whether the judgment of the county court judge in favour of the plaintiff was correct,—2. Whether the plaintiff was entitled to recover the damages claimed or any and what damages other than nominal

(1) 1 H. & N. 408; 26 L. J. (Ex.) at p. 22.

damages,—3. Whether the judge was right in rejecting the evidence tendered on behalf of the defendants.

The judgment was to be affirmed, reversed, or varied, in accordance with the decision of the Court, the costs to abide the event.

Nov. 22, 1875. *Herschell, Q.C.* (*Webster* with him), for the defendants, contended that, under the circumstances, the company were not liable at all, and at all events not to more than nominal damages; that the contract was not an absolute engagement on their part that the train should arrive punctually at its destination, or in time to meet the corresponding trains throughout the journey, but a mere statement of what the company intended to do, or at the most an engagement that every reasonable effort would be made on their part to insure such a degree of exactitude as is practicable under ordinary circumstances; and that, at all events, the judge was wrong in holding that the plaintiff was justified in hiring, and entitled to charge the company with the hire of, a special train to save the unimportant delay disclosed in the case. They referred to *Stewart* v. *London and North Western Ry. Co.* (1), *Hurst* v. *Great Western Ry. Co.* (2), *Shand* v. *Peninsular and Oriental Co.* (3), and *Henderson* v. *Stephenson.* (4)

[DENMAN, J. That which the plaintiff relies on as a contract is one of the things which the company call a condition, in which they profess to be contrasting that which they undertake to do with that which they do not undertake. We are not asked to say whether the county court judge was wrong in holding that upon the facts proved there was unreasonable delay. That was for him.]

C. Russell, Q.C., and *Crump*, contrà, contended that, taking the ticket, the time bills, and the conditions to constitute the contract between the parties, there was no engagement on the part of the company that there should be absolute punctuality through the journey, still a duty was imposed upon them to use reasonable care to complete the several stages of the journey within the times respectively stipulated; and that, whether they had performed their contract in that respect or not, was for the jury or (in this

10 Jur. N.S. 805.

(1) 3 H. & C. 135; 33 L. J. (Ex.) 199.
(2) 19 C. B. (N.S.) 310; 36 L. J. (C.P.) 264.
(3) 3 Moo. P. C. (N.S.) 272.
(4) Law Rep. 2 H. L., Sc. 470.

11 Jur. N.S. 736

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case) for the county court judge, whose decision on the facts is conclusive,—citing *Prevost* v. *Great Eastern Ry. Co.* (1), and *Buckmaster* v. *Great Eastern Ry. Co.* (2); and that the damages awarded were such as naturally flowed from the breach of contract, according to the rule laid down in *Hamlin* v. *Great Northern Ry. Co.* (3)

Cur. adv. vult.

Jan. 11. The judgment of the Court (Brett, Denman, and Lindley, JJ.) was delivered by

BRETT, J. This was an appeal from a judgment of the county court judge sitting at Bloomsbury. The claim was for the cost of a special train from York to Scarborough, which train the plaintiff had ordered in consequence of his being brought from Liverpool to Leeds too late for the ordinary train from Leeds to Scarborough. The plaintiff took a first-class ticket at the defendants' station in Liverpool by the 2 p.m. train for Scarborough, viâ Eccles, Staleybridge, Huddersfield, Leeds, and York. The ticket had indorsed on it the words, "Issued, &c., subject to the company's regulations and to the conditions in the time tables of the respective companies over whose lines this ticket is available."

The time table of the defendants' company contained the following notices as to the 2 p.m. train, viz.

Leave Liverpool . . .	2. 0 p.m.
Arrive Manchester . . .	3. 5
Leave ———— . . .	3.20
Arrive Leeds	5. 0
Leave ——	5.20
Arrive York	6. 5
Arrive Scarborough . . .	7.30

Certain conditions were set out in the time tables, which were the subject of the discussion.

The train, under circumstances stated in evidence, left Liverpool two or three minutes after 2 p.m., left Manchester at 3.35, and arrived at Leeds at 5.27. The ordinary and corresponding

(1) 13 L. T. (N.S.) 20.
(2) 23 L. T. (N.S.) 471.
(3) 1 H. & N. 408; 26 L. J. (Ex.) 20.

train for York had left at 5.20. The plaintiff proceeded to York by the next train, which left Leeds at 5.55, and arrived at York at 7 p.m. The next train then from York to Scarborough would leave at 8 p.m., and was timed to arrive at Scarborough at 10 p.m. The plaintiff thereupon took a special train by which he arrived at Scarborough between 8.30 and 9 p.m.

The county court judge came to the conclusion that there was a want of attention to insure punctuality, and an unreasonable delay whilst the train was on the defendants' line, which caused the late arrival at Leeds and the loss of the ordinary train to Scarborough; and, refusing to nonsuit the plaintiff, he held that the plaintiff was justified in taking the special train, and was entitled to charge the cost of it against the defendants.

The conditions before referred to were as follows:—

1. The arrival time denotes when the trains may be expected; but the passengers, to insure being booked, should be at the principal stations five minutes earlier and the intermediate stations ten minutes earlier. The doors of the booking-office will be closed punctually at the hours fixed for the departure of the trains; after which no person can be admitted.

2. Time Bills.—The published time bills of this company are only intended to fix the time at which passengers may be certain to obtain their tickets for any journey from the various stations; it being understood that the trains shall not start before the appointed time. Every attention will be paid to insure punctuality as far as it is practicable; but the directors give notice that the company do not undertake that the trains shall start or arrive at the time specified in the bills; nor will they be accountable for any loss, inconvenience, or injury which may arise from delays or detention. The right to stop the trains at any station on the line, though not marked as a stopping station, is reserved.

3. The granting of tickets to passengers to places off the company's line is an arrangement made for the convenience of the public; but the company do not hold themselves responsible for any delay, detention, or other loss or injury whatsoever arising off their lines, or from the acts or defaults of other parties, nor for the correctness of the times over the lines of other companies, nor for the arrival of this company's own trains in time for the nominally corresponding train of any other company or party.

It was argued before us on behalf of the defendants, the appellants, that, taking the ticket, the time table, and the conditions together, there was no contract at all as to any time of arrival; that there was no contract to arrive at the times stated in the time table; that there was no contract to make reasonable effort to arrive at the stated times; that, even if negligence were proved, by reason of which the train did not arrive in a reasonable time and damage

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were thereby caused, the conditions saved the defendants from any liability; that no question could be raised as to whether the conditions were or were not reasonable, for the Railway and Canal Traffic Act did not apply to contracts for the conveyance of passengers; that there was no evidence of negligence or want of reasonable effort; that, at all events, the plaintiff was not entitled under the circumstances to take and charge the defendants with a special train.

It was argued for the plaintiff, that either there was an express contract that the defendants would use every attention to insure punctuality as far as practicable, or an implied contract that they would make reasonable efforts that the trains should arrive at the stated times; that there was evidence of negligence on the part of the defendants which caused the delay; and that the plaintiff was reasonably justified in taking the special train, and was therefore justified in charging the cost of it to the defendants.

The questions are,—first, what facts and documents formed the contract,—secondly, what was the contract,—thirdly, was there any evidence of breach of contract,—fourthly, were the damages such as might be legally pronounced.

As to the first, we are of opinion that the facts and documents which formed the contract were the taking and granting the ticket, the ticket, the time tables, and the conditions. If there were no conditions, or if the ticket did not refer to them, it would be necessary to infer the terms of the contract by implication from the fact of granting and receiving a ticket for such a service as carriage by railway; but it is clear, as it seems to us, that the passenger is referred to the conditions to find the modifications of the contract which would be implied without them. It is that reference which makes them part of the contract.

But then, as to the second question, the reference cannot in such case make only the negative or restrictive parts of the conditions binding as parts of the contract; it must equally make the affirmative and explanatory parts of the conditions parts of the contract. The first condition and the first part of the second, taken together, seem to amount to a contract that every person who arrives at a chief station five minutes before, or at an intermediate station ten minutes before, the advertized time of departure of a train,

shall receive a ticket to be carried and shall be carried by that train. The second part of the second condition is relied upon by the company, and we think rightly relied upon, to modify the contract which would without it be implied, and to prevent the advertizing of the times of arrival and departure from amounting to an absolute contract that the train will arrive or depart exactly at such time. It prevents any liability for any loss, inconvenience, or injury which may arise from delays or detention, however long, considered as mere delay or detention; that is to say, the company does not contract that there will not in fact be delay or detention of the longest period. For instance, the company does not contract against delay or detention, however long, caused by snow, or accident, or the like. But, as the negative and restrictive part of the condition is part of the contract, so we think is the affirmative and explanatory part. We therefore think that the defendants did by the statement to that effect in the conditions contract that they would pay every attention, that is to say, make every reasonable effort, to insure punctuality as far as practicable. We further think that without the conditions there must be an implied contract that the defendants would use reasonable efforts that trains should both start and arrive at the stated times, and that there is nothing in the conditions to restrict that undertaking. The third condition, in the like manner, negatives an absolute contract that punctuality shall be observed either by the defendants or by the other companies, and negatives any responsibility of the defendants for the defaults as to punctuality of the other companies, as, for example, for even a want of reasonable effort by those companies to insure punctuality; but it does not absolve the defendants from using reasonable efforts on their part to meet the corresponding trains of the other companies.

The next question is, whether there was any evidence of a neglect by the defendants' servants of the contract to make every reasonable effort to insure punctuality, and of such neglect, if any, being a cause of the injury alleged by the plaintiff. Now, we do not think that the mere fact of there being some want of punctuality, either in starting a train from its first or any intermediate station, or in the arrival at any station, would be necessarily any evidence of a want of reasonable effort. A delay of

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a few minutes in the original starting may, as it seems to us, obviously occur though every reasonable effort is made to start the train punctually, and therefore would of itself be no evidence which ought to be acted upon or left to a jury of a want of reasonable effort. If any delay, however short, is to be evidence of a breach of contract, the company is practically bound to an absolute contract to start to the moment, which we have held is not the true construction of their contract. Neither is the mere fact of some unpunctuality in arriving at or leaving an intermediate station evidence by itself of a neglect of a reasonable effort to secure punctuality. But an unusual or long delay would, we think, be evidence calling upon the company to account for it by shewing that it occurred, as, by the bursting of an engine pipe, or collision, or snow or wet preventing friction, or accident, or by a sudden, unexpected, and not to be reasonably expected, pressure of passengers,—something which prevented punctuality, notwithstanding reasonable efforts to secure it were made.

We think that, in this case, the delay of fifteen minutes in starting from Manchester was of itself sufficient to require explanation; that the delay at St. Helen's Junction required explanation; and that these two facts were evidence of negligence, that is to say, of want of reasonable effort to be punctual. We should observe that we need not agree and do not agree with the idea that the defendants ought to have closed the doors at Liverpool before the advertized time, in order to shut out tardy passengers; for, the first condition contains an undertaking that the booking-office will be closed punctually, and the second that the train will not start from any station before the advertised time. But, as we have said, we think there was evidence of negligence on the part of the defendants which caused delay in leaving Manchester; and we further think that there was evidence that the delay in leaving Manchester was a cause of the too late arrival at Leeds, and so of the impossibility of arriving in time at Scarborough. If there was evidence, we have no right to interfere with the conclusion.

As to the damages, we think that the rule attributed to Alderson, B., in *Hamlin* v. *Great Northern Ry. Co.* (1) is a good expression of the law. We think it may properly be said that, if

(1) 1 H. & N. 408; 26 L. J. (Ex.) at p. 22.

the party bound to perform a contract does not perform it, the other party may do so for him as reasonably near as may be, and charge him for the reasonable expense incurred in so doing. The same rule is laid down by Blackburn, J., in the case of *Hobbs* v. *London and South Western Ry. Co.* (1), who says: "The general rule is that the damages to be recovered in an action for a breach of contract to supply something are, the difference between that which should have been supplied and the cost of obtaining something equally good, or, if that is not attainable, of the best substitute." We think that in this case there was evidence upon which the county court judge might not unreasonably find, and has in effect found, that the plaintiff was not reasonably called upon to wait at York for the late train, and might reasonably take the special train to Scarborough, being for such a distance at such a price; and therefore we think that the county court judge was justified in law in holding that the plaintiff might charge the defendants with the cost of the special train.

We do not say that, in every case of a passenger missing a train in correspondence with that in which he is, though he miss it by the default of the company's servants, he is therefore entitled immediately to take a special train for any distance at any cost, or that a judge or jury would be bound to allow in every case, or justified in allowing in every case, for the cost of a special train. The question must always be whether it was a reasonable thing to do, having regard to all the circumstances. Where to take a special train is a reasonable thing to do, we are of opinion that it is a sufficiently natural result of the breach of contract to bring it within the legal rule.

We are of opinion that the judgment appealed against was substantially correct, and that the appeal must be dismissed, with costs.

Appeal dismissed, with costs.

Feb. 16. Against this judgment the defendants appealed.

Herschell, Q.C., and *Webster*, for the defendants.

Russell, Q.C., and *Crump*, for the plaintiff.

The following authorities were cited in addition to those cited

(1) Law Rep. 10 Q. B. 111; 44 L. J. (Q.B.) 49, at p. 52.

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below: *Phillips* v. *Clark* (1); *Grill* v. *General Iron Screw Collier Co.* (2)

Cur. adv. vult.

May 10. The following judgments were delivered:—

CLEASBY, B. In this case the plaintiff had taken a railway ticket at the defendants' station at Liverpool for a journey from Liverpool to Scarborough. Some portions of the line belonged to the defendants, but other portions of the line belonged to other companies.

According to the time tables the time for the starting of the train from Liverpool was 2 p.m., and for arrival at Scarborough, 7.30. The time for arrival at Leeds was 5 o'clock, and the train to carry the plaintiff on to Scarborough left Leeds at 5.20. But the train was twenty-seven minutes late at Leeds, arriving at 5.27, and the train for Scarborough had then left. The plaintiff proceeded by the next train to York, and finding that the next train for Scarborough would arrive at 10 o'clock, he took a special train, by which he arrived at Scarborough between 8.30 and 9 o'clock. The cost of the special train was 11*l.* 10*s.*, and the action was brought in the county court, the plaintiff recovering as damages the 11*l.* 10*s.* expended in completing the journey as before mentioned.

The principal question argued before us was the effect of the conditions referred to in the railway ticket which formed part of the contract of carriage.

These conditions, so far as the present question is concerned, were in these terms:—

"The arrival time denotes when the trains may be expected, but the passengers to insure being booked should be at the principal stations five minutes earlier, and the intermediate stations ten minutes earlier. The doors of the booking-office will be closed punctually at the hours fixed for the departure of the trains, after which no person can be admitted.

"Time Bills.—The published train bills of the company are only intended to fix the time at which passengers may be certain to

(1) 2 C. B. (N.S.) 156; 26 L. J. (C.P.) 168. 3 Jur. N.S. 467

(2) Law Rep. 1 C. P. 600. 12 Jur. NS 727

obtain their tickets for any journey from the various stations, it being understood that the trains shall not start before the appointed time. Every attention will be paid to ensure punctuality as far as it is practicable, but the directors give notice that the company do not undertake that the trains shall start or arrive at the time specified in the bills, nor will they be accountable for any loss, inconvenience, or injury which may arise from delays or detention. The right to stop the trains at any station on the line, though not marked as a stopping station, is reserved. The granting of tickets to passengers to places off the company's line is an arrangement made for the convenience of the public; but the company do not hold themselves responsible for any delay, detention, or other loss or injury whatsoever arising off their lines, or from the acts or defaults of other parties, nor for the correctness of the times over the lines of other companies, nor for the arrival of this company's own trains in time for the nominally corresponding train of any other company or party."

It was argued on behalf of the defendants, that the effect of these conditions was to exempt them from responsibility in respect of the trains not arriving at the time specified. The plaintiff contended that, taking the whole together, they were not absolved from the consequences of delay if it could be attributed to any want of attention on their part to ensure punctuality.

It appears to me that the only reasonable construction of these conditions is, that the defendants undertake no responsibility whatever in relation to the arrival of trains at particular times to meet other trains. The language must be considered with reference to the subject-matter to which it relates, viz. arrival of trains, and the defendants may be well understood to say, such are the uncertain exigencies of traffic requiring trains sometimes much heavier than at other times, so uncertain are the times occupied in the letting passengers out with all their luggage, and taking them in (all which is inevitable unless there are to be great disappointments), and so many other causes such as the state of the rails, fogs, very high winds, &c., affect the times of arrival that we do not accept any responsibility for delay beyond the times advertised. The times are advertised, for convenience, at which we expect and have a right to expect from our arrangements that the

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trains will arrive, but we do not bind ourselves that they shall do so. The words are: "The directors give notice that the company do not undertake that the trains shall start or arrive at the time specified in the bills, nor will they be accountable for any loss, inconvenience, or injury which may arise from delays or detention." No language can possibly be clearer or more free from ambiguity than this, and it is the language expressly directed to what their responsibility or contract is.

It appears to me that it would be unreasonable to read this clear language of contract as controlled by the vague assurance given before that every attention will be given to insure punctuality so far as it is practicable. No one would think of entering into so indefinite a contract, and for the same reason it ought not to cut down a contract clearly expressed.

Indeed, to hold the language of exemption as only applicable when there had been no want of attention to insure punctuality would practically deprive the defendants of the benefit of it, by compelling them to satisfy the severest test of opinion as to what might possibly have been done to produce a result which practically cannot be made certain. Their position would be hopeless if they had in every case of delay to make out satisfactorily that every such attention had been paid.

A breakdown might take place on the line, and it might be traced to some negligence of the company's servants in not shunting or signalling properly, and the consequence would be that every passenger in the train which followed would have a cause of action for being delayed beyond the time.

I must say that it appears to me that there is no binding contract as to the particular time of arrival, either as an absolute contract, or a contract that every attention should be paid to ensure it, which is all we have to consider in the present case.

The contract of carriage would continue, involving certain obligations on the part of the carriers in carrying it into effect fairly and reasonably both as regards time and other matters, but we are not dealing with the general question, but only with the question whether they are responsible in respect of the times mentioned in the tables not being kept, and for the reasons given I am of opinion that they are not.

This makes it unnecessary to consider the other question discussed before us, viz. whether the expenses of the special train could be properly recovered. But, without saying that in no case whatever could the traveller charge the expense of a special train as part of his damages, I feel justified in expressing my opinion that every person disappointed through some default of the company in catching a particular train would not be entitled, as a matter of law, to reinstate himself as nearly as he could by means of a special train, and if the county court judge acted upon the view that in general he would be entitled to do so, I think he would have been wrong, and I can suggest no better guide upon the question of damage than that given in the judgment of Lord Justice Mellish. For the above reasons it appears to me that the judgment already given should be reversed.

JAMES, L.J. I am of opinion that the company are not entitled to strike out from the contract the words, "But every attention will be given to ensure punctuality so far as it is practicable," and to treat this as a mere vague assurance having no legal operation, involving no legal responsibility, but only a responsibility to public opinion, to be enforced by letters to the *Times* or a local journal.

I agree, however, that it is to be read in connection with the very clear stipulations that the company are not to be accountable for any loss, inconvenience, or injury which may arise from delays or detention.

It appears to me that the whole sentence is capable of a reasonable and consistent legal operation.

The contract is to be read as if it were a contract made with regard to that particular train on that particular day, just as if somebody else, not the company, had made for that day arrangements enabling them to take passengers from Liverpool to Scarborough.

The company might reasonably stipulate that it would not be answerable for any delay occasioned by anything on the line, any block at a station, any break down of any other train, or any of the innumerable accidents which do occur, and must occur constantly on every line of traffic. But, at the same time, it might

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well promise and undertake that, so far as regarded that particular train, or that particular journey, every attention would be given to ensure punctuality.

If we consider the immense extent and complication of a modern railway system and network in England, it would be most unreasonable to put a construction on such a document as the one before us which would enable any passenger delayed anywhere to put the whole traffic arrangements, and the conduct of the whole railway staff, on its trial before a judge or jury. It is quite possible, and not improbable, that the negligence or blunder of officials in London or at Carlisle, of the guard of a goods train, a pointsman, or signalman, might derange the traffic so as to cause a block or delay on a branch line hundreds of miles away. And, to my mind, it is not to be endured that for such a negligence as that the company is to be liable to every passenger everywhere delayed by it.

Again, it appears to me that the company must be at liberty to accept any traffic brought to it, a special train for the Queen or a royal visitor, to accept an army of volunteers or excursionists, although it thereby disabled itself later in the day from keeping the times mentioned in its time tables. But if we read the contract reddendo singula singulis as applicable and limited to each particular train for each particular journey, then we can reasonably construe the statement in the conditions as a promise that the persons having the control and management of that train for that journey, will pay every reasonable attention, so far as it is practicable for them, to ensure punctuality, viz. that they will not be guilty of wilful delay or reckless loitering. I am of opinion that there was some evidence before the county court judge to justify a conclusion that there was such wilful delay.

In the time tables a margin of fifteen minutes was allowed at Manchester. Now, according to the regulations, every person minded and entitled to go on from Manchester by that train ought to have been with his luggage on the platform, ready to start at 3.20, and it does appear to me, as it did to the county court judge, that if proper attention had been then and there paid to insure punctuality, the passengers getting out at Manchester would have been immediately got out, and the passengers getting in would have been got in without a minute's delay, and if this had been

done the further delays between Manchester and Leeds would in all probability have been avoided; for we all know that the want of punctuality of a train in the early part of its journey is almost invariably followed by disarrangements and further delays in the further prosecution of its journey. But I am not satisfied that in dealing with that question of fact, viz. whether there was a breach of the contract, the county court judge rightly construed the contract or rightly apprehended what would be a breach of it. I am not satisfied that he put the question to himself in this way: Were the persons having the control and management and conduct of the train on that day guilty of wilful delay or reckless loitering?

With respect to the remaining question, whether the plaintiff was entitled to take the special train, I certainly should not myself have arrived at the same conclusion as the county court judge. I agree that the general rule is that a person with whom a contract has been broken has a right to fulfil that contract for himself as nearly as may be, but he must not do this unreasonably or oppressively as regards the other party, or extravagantly. I should myself have held it most unreasonable and oppressive for the plaintiff to have taken a special train merely to get in an hour earlier at the terminus of his journey on the seaside. And I think it must be taken that the county court judge did consider the dictum of Mr. Baron Alderson as establishing it as a rule of law that the plaintiff was, and that every other passenger for Scarborough by that train would have been, entitled to save himself the discomfort and ennui of an hour's detention at York, by taking a special train for Scarborough.

I am of opinion that the matter must go back for a new trial.

MELLISH, L.J. This was an appeal from a judgment of the Common Pleas Division, affirming a judgment of the county court judge sitting at Bloomsbury, special leave having been given to appeal to us. The action in the county court was brought by the plaintiff, Mr. Le Blanche, against the London and North Western Railway Company, to recover 11*l.* 10*s.*, the cost of a special train which the plaintiff engaged to carry him from York to Scarborough, on account of his having arrived too late at York

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for the train which leaves York at 6.5 for Scarborough, through, as he alleged, the neglect of the defendants in not properly performing their contract with him to convey him from Liverpool to Scarborough. It was held by the judge of the county court that the plaintiff was entitled to recover the cost of the special train. The plaintiff, on the 16th of August, 1874, took a first-class ticket at the defendants' station at Liverpool by a train which left Liverpool at 2 p.m., and, according to the time tables, was expected to arrive at Manchester at 3.5, to leave Manchester at 3.20, to arrive at Leeds at 5.0, to leave Leeds at 5.20, to arrive at York at 6.5, and at Scarborough at 7.30. The train was fifteen minutes late when it left Manchester, and twenty-seven minutes late when it arrived at Leeds, and consequently the plaintiff was too late to go on to York by the train which left Leeds at 5.20. The plaintiff left Leeds by the next train, and arrived at York at 7 p.m. The next train which left York for Scarborough started at 8 p.m., and was timed to arrive at Scarborough at 10 p.m The plaintiff thereupon took a special train from the North Eastern Railway Company and arrived at Scarborough between 8.30 p.m. and 9 p.m. Three questions were argued before us, on which it is necessary that we should give an opinion:—First, was there any contract on the part of the defendants that they would use reasonable exertions to insure punctuality, so that the train might arrive at Leeds in time for the train which was to leave Leeds for York at 5.20? Secondly, if there was, was there any sufficient evidence that the contract had been broken, and that it was through the fault of the defendants that the train arrived so late at Leeds; and, thirdly, was the plaintiff entitled to recover the cost of the special train? Now, with respect to the first question: the ticket issued to the plaintiff had indorsed upon it the words, "Issued by the London and North Western Railway Company; subject to the company's regulations and to the conditions in the time-tables of the respective companies over whose lines this ticket is available," and it was admitted in the argument before us by the counsel on both sides that the conditions annexed to the company's time tables formed part of the contract between the plaintiff and the defendants. These conditions were as follows:—[His Lordship then read the conditions.]

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We have, therefore, to consider what is the true effect of these conditions.

On the part of the plaintiff it was argued that the reference to the time tables in the ticket might, independently of the conditions, make the company absolutely liable for the non-arrival of the trains at the specified times, and that the only effect of the conditions was to free the company from such absolute liability, but that they still remained liable for a non-arrival of this train caused by their own negligence. On the other hand, it was contended, on the part of the defendants, that the effect of the conditions was to free them from all liability in respect of the non-arrival of their trains in proper time, whatever might be the cause which occasioned the delay, and that the words, "Every attention will be paid to ensure punctuality as far as practicable," formed no part of the contract, or, if they did form part of the contract, that their meaning was that the company would make proper regulations to ensure punctuality, but that nevertheless the company were not to be liable for any neglect on the part of their servants in carrying out those regulations. Now it is to be remembered that the language of the conditions is the language of the company, that the conditions are imposed by them, and that they are seeking to put a construction on the conditions the effect of which will be to free them from a liability which the law unquestionably, in the absence of an express agreement to the contrary, imposes on them, namely, a liability to be answerable for the negligence of their servants. Under these circumstances, I think that the conditions are to be construed, so far as they are ambiguous, against them; that the words, "Every attention will be paid to ensure punctuality as far as practicable," must be treated as part of the contract, and as modifying every other statement contained in the conditions.

If the language had been,—"the directors give notice that the company do not undertake that the trains shall start or arrive at the time specified in the bills, nor will they be answerable for any loss, inconvenience, or injury which may arise from delays or detention, but every attention will be paid to ensure punctuality as far as practicable," the construction would have been clear, and I do not think it really matters which clause of the sentence comes first.

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I also think that this construction is confirmed by comparing the terms in which the company speak of their liability for what may happen on their own line with the terms in which they speak of their liability for what may happen on the lines of other companies.

In the last clause of the conditions they say the company do not hold themselves liable for any delay or detention arising from acts or defaults of other parties.

Why do they not say, in equally plain terms, that the company do not hold themselves liable for any delay or detention arising from their own act or default if that is what they meant?

I also think that there is no valid ground for the distinction contended for by Mr. Herschell between the regulations made by the company and the mode in which those regulations are carried out by the servants of the company. If they are liable at all for negligence in not ensuring punctuality, they must be as liable for the negligence of the servants of the company in carrying out the regulations as for the negligence of the directors in not making proper directions. I am, therefore, of opinion that the contract for which the plaintiff contends was sufficiently proved.

I have next to consider whether there was sufficient evidence that the contract was broken, and that by reason of that breach the plaintiff did not arrive at Leeds in time for the train at 5.20.

Both the county court judge and the judges of the Common Pleas Division have elaborately examined the evidence respecting the different acts of neglect imputed to the defendants, and I think it sufficient to say, on this part of the case, that I agree in the conclusion they have arrived at, and the reasons they have given for it.

I think that the fact of the train being a quarter of an hour late when it left Manchester made it necessary for the defendants to give some explanation respecting the cause of the delay, and that it is impossible to lay down as a matter of law that the county court judge was bound to be satisfied with the explanation given by the guard, even assuming that he believed everything the guard said. I think that there was evidence from which he might properly come to the conclusion that it was through the neglect of

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the company that the train was a quarter of an hour late at Manchester, and that this was the cause of the plaintiff losing his train at Leeds. Lastly, I have to consider whether the plaintiff was entitled to recover as special damages the cost of the special train from York to Scarborough.

Now, I agree that, as a general rule, what is said by Alderson, B., in *Hamlin* v. *Great Northern Ry. Co.* (1), is correct, namely: "The principle is, that if the party does not perform his contract the other may do so for him as near as may be, and charge him for the expense incurred in so doing." I agree also with what is said by the judges of the Common Pleas Division, that this rule is not an absolute one applicable to all cases, and that the question must always be whether what was done was a reasonable thing to do having regard to all the circumstances. This, however, is a very vague rule, and it is desirable to consider whether any more definite rule can be laid down. Now, one mode of determining what, under the circumstances, was reasonable, is to consider whether the expenditure was one which any person in the position of the plaintiff would have been likely to incur if he had missed the train through his own fault, and not through the fault of the railway company. The rule that what is reasonable under particular circumstances may be discovered by considering what a prudent person, uninsured, would do under the same circumstances, is applicable to many cases besides those which arise under policies of marine insurance.

I think that any expenditure which, according to the ordinary habits of society, a person who is delayed in his journey would naturally incur at his own cost, if he had no company to look to, he ought to be allowed to incur at the cost of the company, if he has been delayed through a breach of contract on the part of the company, but that it is unreasonable to allow a passenger to put the company to an expense to which he could not think of putting himself if he had no company to look to. The question, then, in my opinion, which the county court judge ought to have considered is, whether, according to the ordinary habits of society, a gentleman in the position of the plaintiff, who was going to Scarborough for the purpose of amusement, and who missed his train at York,

(1) 1 H. & N. 408; 26 L. J. (N.S.) (Ex. Ch.) 20, at p. 22.

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would take a special train from York to Scarborough at his own cost, in order that he might arrive at Scarborough an hour or an hour and a half sooner than he would do if he waited at York for the next ordinary train. This question seems to me to admit of but one answer, namely, that no one but a very exceptionally extravagant person would think of taking a special train under such circumstances. I am of opinion, therefore, that the county court judge did not act on the proper principle in considering the question of damage; and that unless the parties consent to the damages being reduced to 1*s.*, there ought to be an order for a new trial.

I think each party should pay his own costs of the appeal to the Common Pleas Division, and of the appeal to us.

BAGGALLAY, J.A. The action in this case was brought in the Bloomsbury County Court, to recover from the defendants the sum of 11*l.* 10*s.*, being the amount paid by the plaintiff for a special train from York to Scarborough, under the following circumstances. On the afternoon of the 10th of August, 1874, the plaintiff took a through ticket at the defendants' station in Liverpool for the journey from that town to Scarborough; on the ticket was an indorsement in the following terms:—"Issued by the London and North Western Railway Company, subject to the company's regulations and to the conditions in the time tables of the respective companies over whose lines this ticket is available."

The only regulation of the company to which it appears material to refer, other than those included in the time table conditions, is that which prohibits the driver of any train from making up lost time by increase of speed. This appears to have been a regulation of the company, from the evidence of the guard, as stated in the case. The conditions in the time table, so far as they are material for the purposes of the present case, are in the following terms:—

"The arrival time denotes when the trains may be expected, but the passengers, to insure being booked, should be at the principal stations five minutes earlier, and the intermediate stations ten minutes earlier. The doors of the booking office will be closed punctually at the hours fixed for the departure of the trains, after which no person can be admitted.

"Time Bills.—The published train bills of the company are only intended to fix the time at which passengers may be certain to obtain their tickets for any journey from the various stations, it being understood that the trains shall not start before the appointed time. Every attention will be paid to ensure punctuality as far as is practicable, but the directors give notice that the company do not undertake that the trains shall start or arrive at the time specified in the bills, nor will they be accountable for any loss, inconvenience, or injury which may arise from delays or detention. The right to stop the trains at any station on the line, though not marked as a stopping station, is reserved. The granting of tickets to passengers to places off the company's line is an arrangement made for the convenience of the public; but the company do not hold themselves responsible for any delay, detention, or other loss or injury whatsoever arising off their lines, or from the acts or defaults of other parties, and for the correctness of the times over the lines of other companies, nor for the arrival of this company's own trains in time for the nominally corresponding train of any other company or party."

Before proceeding to a consideration of the purpose and effect of these regulations and conditions, and of the contract by which the defendants became bound by their issuing to the plaintiff a through ticket, it will be convenient, and I think necessary, to examine somewhat minutely the general circumstances of the traffic to which they were made applicable. And, first, it is to be noted that the railway from Liverpool to Scarborough, though continuous, did not belong wholly to the defendants, nor was it worked throughout by the defendants, nor even by continuous trains. From Liverpool to Leeds the line was worked by the defendants, and from Leeds to York and from York to Scarborough by the North Eastern Railway Company; again, the line from Liverpool to Leeds, which was worked throughout by the defendants, did not belong wholly to them, though they had running powers over those portions of the line of which they were not the owners; portions of the line, in fact, belonged to three other companies—the Lancashire and Yorkshire, the Manchester, Sheffield, and Lincolnshire, and the Midland—and these several portions of the line between Liverpool and Leeds formed parts of

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other systems more or less connected with the through line. Between Liverpool and Leeds there were no less than seven changes in the ownership of the line. In addition to this, several of the principal stations on the line, including those at Manchester and Staleybridge Junction, belonged to other companies, whose servants regulated the admission into such stations of the defendants' train. It is obvious to how many possible causes of accidental delay a through train passing over the line between Liverpool and Leeds was subject, and it is not immaterial to observe that in so complicated a system a delay of very trifling duration in its origin might, in the result, occasion one of very considerable importance.

The train by which the plaintiff travelled left Liverpool at three minutes after 2 p.m., being three minutes later than the time fixed for its departure as published on the defendants' time bills; its time for arriving at Leeds, as published on the same time bills, was 5 p.m.; and it also appeared, from the same bills, that a train of the North Eastern Company was timed to leave Leeds for York at 5.20 p.m., reaching that city in time for a corresponding train to Scarborough, which would be due at Scarborough at 7.30 p.m.

The train from Liverpool did not, in fact, reach Leeds until 5.27, when the North Eastern Company's 5.20 train had left for York, and the plaintiff was consequently delayed at Leeds until 5.55, when the next train left for York; and on his arrival at York at 7 p.m. there was no train leaving for Scarborough earlier than 8 p.m., and that train would not be due at Scarborough until 10 p.m. The plaintiff thereupon took a special train from York to Scarborough, arriving at Scarborough between half-past 8 and 9 o'clock; for this special train he paid 11*l.* 10*s.* to the North Eastern Company, and then commenced the present action against the defendants to recover the amount so paid.

It was admitted by the plaintiff, and by his counsel, that he had not any business or engagement whatever at Scarborough necessitating his arrival there at any particular time, and that he had, in fact, taken the special train for the purpose of raising the question whether a passenger was, under such circumstances, entitled to do so. On the part of the plaintiff it was contended

that, by the acceptance from him of the full fare from Liverpool to Scarborough, and the issue to him of a through ticket, the defendants became bound to make all reasonable efforts to ensure the arrival of the train at Scarborough by 7.30 p.m., and rendered themselves liable for its non-arrival there at that time, unless the delay was occasioned by some cause other than the default or negligence of the defendants or their servants; that the delay in arriving at Leeds, which was the substantial cause of the plaintiff's not arriving at Scarborough by the train timed to arrive there at 7.30, was in fact caused by the default or negligence of the defendants or their servants; and that inasmuch as, in consequence of such delay, the plaintiff was unable to proceed to Scarborough by the train due there at 7.30, he was not bound to wait for the next train, which would not arrive there before 10, but was entitled to take a special train and to charge the cost of it to the defendants.

For the defendants, on the other hand, it was contended that this was not the true effect of the contract; that whatever might have been the cause of the non-arrival of the train at Leeds at the time specified in the time bills, the defendants would have been protected by the conditions from liability in respect of such delay, or, at any rate, that they could not have been liable unless the delay had arisen from some wilful default or negligence on their own part, or on that of their servants; and that, inasmuch as there had not, in fact, been any such wilful default or negligence, they were under no liability to the plaintiff; and, further, that in any view of the case, the plaintiff was not justified in taking a special train, and was not entitled to recover the costs of it from the defendants.

The decision of the judge of the county court was in favour of the plaintiff, and he ordered payment to him by the defendants of the 11*l.* 10*s.*, and of the costs of the action, reserving leave to the defendants to move the Court above; on appeal to the Court of Common Pleas, the order of the county court was affirmed; and against the order so affirmed, the present appeal is brought, leave having been granted by the Court of Common Pleas for that purpose in consideration of the great importance of the case, not only to railway companies, but to the public generally.

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Three questions have been raised in the argument before us: first, what was the true purport and effect of the contract by which the defendants became bound by the issue to the plaintiff of a through ticket from Liverpool to Scarborough; secondly, were the defendants guilty of a breach of such contract; and, thirdly, upon the assumption that they were so guilty, was the plaintiff entitled to take a special train and to charge the cost of it to the defendants. The first question resolves itself into a consideration of the proper construction to be put upon the conditions contained in the time bills.

Now, omitting from present consideration the earlier conditions, which have reference to the booking of passengers and the starting of trains, and which appear to affect the question of breach of contract, rather than that of the construction of the contract, we have in effect to deal with two series of conditions—the one general in their terms, the other limited to contracts of carrriage between a station on the defendants' line and a station on another company's line.

In approaching the consideration of the true effect and meaning of these conditions, we must, I think, bear in mind the circumstances under which, and the species of traffic to which, they were intended to be applicable. These I have already pointed out, and it is unnecessary for me further to advert to them.

The first series of conditions commences with the statement that "every attention will be paid to insure punctuality so far as it is practicable," and this statement is followed (amongst other stipulations) by a notice that the company will not undertake that their trains shall start or arrive at the times specified in the time bills, and that the company will not be accountable for any loss, inconvenience, or injury which may arise from delays or detention. Now, in construing this first series of conditions, I think it quite immaterial whether the later words are to be regarded as moderating the effect of the earlier undertaking to pay every practicable attention to secure punctuality, or the earlier statement is to be regarded as governing or modifying the absolute terms of the subsequent paragraphs. In either view of the case they must, I think, be construed as a whole; and if so construed, they, in my opinion, so far as they affect the present

question, amount to this: that the defendants will use every endeavour, consistently with the ordinary and reasonable use and working of the line, to ensure punctuality, but that they will not hold themselves responsible for delay in arriving at any particular station, when that delay has arisen from causes over which they have no control, or which, being incidental to a reasonable working of the line, are practicably unavoidable. Such, for instance, as an unexpected delay in admission into a station under the control of another company, or an unusual accession of passengers or goods, which last-mentioned circumstance must almost of necessity occasion delay in the starting of a train, and consequently in its arrival at its destination, especially when, under the regulations of the company, as in the present case, the doors of the booking-office are not closed until the time fixed for the departure of the train, and the driver of the train is not allowed to make up for lost time by extra speed. These regulations have been made for the convenience and protection of the public, but are such as cannot fail to lead to occasional, or even frequent, delays.

If we pass now to an examination of the second series of conditions we find that they are introduced by the following words: "The granting of tickets to passengers off the company's line is an arrangement made for the convenience of the public;" and that they in terms protect the defendants from responsibility in respect of three several subject-matters, all incidental to a traffic between stations on the line worked by the defendants and stations on lines worked by other companies. These three subject-matters are, 1st, delay, detention, or other loss or injury arising off the lines of the defendants or from the acts or defaults of other parties; 2ndly, the correctness of the times over the lines of the other companies; and, 3rdly, the arrival of the defendants' trains in time for the nominally corresponding trains of other companies. It is with the third only of these subject-matters that we have at present to do.

Now I do not think that the contention or suggestion of the defendants, that the effect of this condition was to free them wholly from responsibility in respect of the non-arrival of their trains in time to meet the corresponding trains of other companies, whatever might be the cause of the delay, can be maintained; to so construe the condition would be, in my opinion, to ignore the

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introductory words which indicate that the object of the condition which follows was to protect the defendants from the consequence of an act done for the convenience of their passengers, and not to relieve them from any liability to which they would have been otherwise subject by reason of their issuing a through ticket to any place off their line. It appears to me that the fair and reasonable interpretation to put upon the conditions is this: that they protect the defendants against being subjected, by reason of their issuing a through ticket to any place off their line, to any additional responsibility beyond what they would have been subject to if they had issued a ticket to the furthest point of their own line, and had left the passenger to take a fresh ticket to his ultimate destination. Such a condition does not appear unreasonable; by issuing a through ticket to his ultimate destination beyond their line the defendants relieve the passenger from the trouble and delay and possible detention which would have been occasioned by his having to take a fresh ticket, and having done this for his convenience, they might fairly claim to be exempted from any additional liability arising out of such act.

If this be the correct construction of the time-table conditions, it will follow that the liability of the defendants in respect of the non-arrival of their train at Leeds in time to meet the corresponding train to York, is the same as it would have been if they had issued to him a ticket to Leeds only, and their train had arrived there at 5.27 instead of at 5, and, as has been pointed out in considering the first series of conditions, the defendants would have been under no liability in respect of such delay if it had been occasioned by causes over which they had no control, or which were incidental to a reasonable working of the line.

It appears to me that neither by the county court judge nor by the Court of Common Pleas has sufficient effect been attributed to that which I have ventured to term the second series of conditions, and which, as it appears to me, were intended to secure to the defendants a further protection against liability, in respect of contracts of carriage to places off their own lines, beyond that to which they were entitled under the first series of conditions in respect of contracts of carriage to places on their own lines.

Now, if according to the true effect of the contract the liability

of the defendants to the plaintiff in respect of delays or detention was limited to that to which they would have been subjected if they had issued a ticket to Leeds only, it becomes immaterial in the present case to consider the cause of the delay in arriving at Leeds, inasmuch as, upon the assumption of the defendants having been guilty of a breach of their contract, the plaintiff could have only recovered nominal damages, it being admitted that he had not sustained any pecuniary damage or been put to any expense by reason of the delay in arriving at Leeds, other than that occasioned by his taking the special train, in respect of which, as I purpose showing presently, he would not, in my opinion, have been entitled to make any demand upon the defendants.

As, however, some of the members of the Court take a different view from that which I have expressed of the purport and effect of the contract, and are of opinion that according to its true purport and effect the defendants were bound to make all reasonable efforts to ensure the arrival of the train at Scarborough by 7.30 p.m., I think it right to express my opinion upon the other two questions which have been raised in the course of the argument, viz. whether the defendants have been guilty of a breach of such contract, and if so, whether the plaintiff was justified in taking a special train and could charge the cost of it to the defendants. Now the question of breach is one entirely depending upon the evidence in the case, and I am of opinion that unless the county court judge, in dealing with the evidence, had acted upon any wrong view of the law equivalent to a misdirection of the jury, had the case been tried by a jury, his decision in this respect ought not to be interfered with. From the statements in the case I gather that it was established to the satisfaction of the county court judge that there was unreasonable delay; that there were no unusual circumstances justifying or excusing such delay; that in more than one instance delay was occasioned by a want of attention to ensure punctuality, and that upon the whole there was negligence on the part of the defendants. If these general views had not been modified by anything else appearing upon the judgment of the county court judge, they would have been sufficient to support his decision that the defendants had committed a breach of their contract, and with such decision I should not have thought it right to interfere; but

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it appears from the case that when the judge expressed his opinion that the delay had been occasioned by a want of attention on the part of the defendants to ensure punctuality, he proceeded to mention, as an instance of such want of punctuality, the keeping the doors open to the last moment at Liverpool. Now it is quite true that if the passenger is allowed to book up to the time fixed for the departure of the train, the train cannot start punctually, and delay must be occasioned; but it appears to have escaped the notice of the learned judge that this practice formed the subject of one of the conditions by which the plaintiff was bound, and I am unable to see how this can be regarded as a want of attention on the part of the defendants or their servants to insure punctuality. It is impossible to determine how much of the subsequent delays were occasioned by the first delay at Liverpool. Under these circumstances, I do not think that the finding of the judge as to the question of breach should be regarded as conclusive; and the more so as, in my opinion, no one of the causes of delay mentioned in the case can be fairly considered as having arisen otherwise than from causes beyond the control of the defendants, or which were incidental to the reasonable working of their railways. But, assuming the county court judge to have been right in considering that the defendants had been guilty of a breach of the contract of carriage entered into by them, the question remains whether the plaintiff was justified in taking the special train and charging the cost of it to the defendants. Upon this branch of the case certain dicta of Baron Alderson, in the case of *Hamlin* v. *Great Northern Ry. Co.* (1), have been much relied upon on the plaintiff's behalf, and these dicta apparently formed the chief grounds of the decision of the county court judge. In that case a tradesman had taken a ticket from London to Hull, and on his arriving at Grimsby there was no train by which he could proceed that night to Hull, as, according to the published time-tables of the company, there ought to have been. He accordingly slept at Grimsby, and in the morning paid 1*s.* 4*d.* for his fare to Hull. In consequence of the delay he failed to keep appointments with his customers, and, being detained for several days, was put to considerable expense. It was held that though he would have been entitled to have per-

(1) 26 L. J. (N.S.) (Ex. Ch.) 20.

formed the contract at the expense of the company, yet, as he had not done so, he was not entitled to recover anything more than nominal damages in addition to the 1*s.* 4*d.* In my opinion, the decision in the case of *Hamlin* v. *Great Northern Ry. Co.* (1), affords no support to the plaintiff's argument; but in the report in the Law Journal Baron Alderson is stated to have made the following observations in the course of the argument: "The plaintiff might have taken a post-chaise, and charged it;" and again, "The principle is, that if the party does not perform his contract, the other may do so for him, as near as may be, and charge him for the expense of so doing."

Now I think that these observations of Baron Alderson, which do not appear in the report of the case in Hurlstone & Norman (1), must be considered as having been made with reference to the particular case then before the Court, and not as intended to lay down an absolute principle applicable to all cases, however different in their circumstances. Having regard to the circumstances of that case, as detailed in the reports, it would have been a very reasonable course for the plaintiff to have pursued to have taken a post-chaise from Grimsby to Hull, so as to secure his arrival there that night, which he could not otherwise have done. But I cannot think that the learned Baron would have considered the principle which he then enunciated as having application to a case like the present. The view taken by the Court of Common Pleas in the present case of the true meaning and effect of the dicta of Baron Alderson, differs from that adopted and acted upon by the county court judge, though it led the Court to the same conclusion. Mr. Justice Brett, in delivering the judgment of the Court, is reported to have said: "We think that the rule attributed to Mr. Baron Alderson in *Hamlin* v. *Great Northern Ry. Co.* (1) is a good expression of the law. We think it may properly be said that if the party bound to perform a contract does not perform it, the other party may do so for him as reasonably near as may be, and charge him for the reasonable expense incurred in so doing."

This appears to me to be a more correct enunciation of the principle applicable to such cases than the particular words attributed to Baron Alderson.

(1) 1 H. & N. 408; 26 L. J. (N.S.) (Ex. Ch.) 20, at p. 22.

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The question, then, in the present case is, whether the taking a special train was a reasonable thing for the plaintiff to do under the circumstances. Now it appears to me that the course pursued by the plaintiff was most unreasonable and oppressive, bearing in mind the fact that he had not any business or other engagement at Scarborough necessitating his arrival there at any particular time, and that he admittedly took the special train for the purpose only of testing whether he could charge the expense of it upon the company.

I quite concur in the view upon which the Court of Common Pleas appears to have proceeded, that primâ facie the question whether the course pursued by the plaintiff in the present case was reasonable was one for the decision of the county court judge, and if he had acted upon the principle as enunciated by the Court of Common Pleas, I should have felt that his decision ought not to be interfered with; but it is clear from the statement of his judgment in the case, that the county court judge considered the principle enunciated by Baron Alderson as absolute and applicable to all cases, and that it was binding upon him in the present case; and that he did not exercise his judgment, as in my opinion he ought to have done, for the purpose of determining whether the course pursued by the plaintiff was reasonable or not.

For these reasons I am of opinion that, even if the true effect of the contract by which the defendants were bound was, that they would make all reasonable efforts to ensure the arrival of the train at Scarborough by 7.30, and if the defendants can properly be considered as having been guilty of a breach of such contract, yet that the assessment of damages, as made by the county court judge, ought not to stand, and that there should be a new trial.

I have only to add that if the interpretation which I think should be put upon the contract is the correct one, and if the liability of the defendants in respect of non-arrival of the train at Scarborough is limited to the liability to which they would have been subjected if the plaintiff had taken a ticket to Leeds only, intending to proceed by the 5.20 train to York, it appears to me perfectly clear that he would not have been entitled, whether his business was urgent or not, to take a special train, and to charge the defendants with the cost of it.

The principle enunciated by Baron Alderson in *Hamlin* v. *Great Northern Ry. Co.* (1) has no application to such a case as that which we are now considering; it has application only to cases in which the act is done and the expense incurred to enable the contract to be performed, and not to cases in which damages consequential upon the breach are claimed. If this case is sent back to the county court judge for a new trial, or if similar cases should hereafter arise, I think the rule suggested by Lord Justice Mellish would prove a safe guide for determining what steps may with propriety be taken by a railway passenger for securing the performance, as near as may be, of the contract of carriage entered into with him by a railway company.

MELLOR, J. I have had the advantage of reading the judgments prepared by the other members of the Court, and, inasmuch as I agree entirely with the view of the facts of this case as expressed by Lord Justice Mellish in the judgment prepared by him, I think it unnecessary to write or deliver a separate opinion; but I think that the judgment of the Common Pleas is erroneous in so far that it dismissed the appeal of the defendants, and with costs.

I think that a new trial ought to have been directed as to the mode upon which the damages were assessed. It appears that there must be a new trial, as this Court has no power to reduce the damages to 1*s.* unless the petitioner will consent to their being reduced, and I think that in such case there should be no costs on either side.

Judgment reversed.

Solicitors for plaintiff: *Argles & Rawlins.*

Solicitor for defendants: *Roberts.*

(1) 1 H. & N. 408; 26 L. J. (N.S.) (Ex. Ch.) 20, at p. 22.

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May 10.

SANDERS AND OTHERS *v.* STUART.

Damages—Remoteness—Failure to transmit telegraphic Message—Message in Cipher.

The defendant's business was to collect telegraphic messages for transmission to America and other places. The plaintiffs intrusted the defendant with a message in cipher, which was unintelligible to the defendant, for transmission to America. The defendant negligently omitted to send the message. The consequence was that the plaintiffs lost a sum of money which they would have earned for commission upon an order to which the message related:—

Held, that the plaintiffs could not recover such sum of money from the defendant, but only nominal damages.

THE nature of the action (1) and the facts sufficiently appear from the judgment. A verdict having been entered for the plaintiffs for the amount claimed, a rule nisi had been obtained, in pursuance of leave reserved, to reduce the damages to such sum as the Court should think fit.

April 26. *Butler* shewed cause. The defendant ought, in the nature of things, to infer that the telegram, though in cipher, was one of importance, and that negligence in the transmission of it might lead to serious loss. The damages may consequently be said to have been in the contemplation of the parties within the meaning of the rules as to remoteness of damage. The true reason of the rule is, that the defendant may not be subjected to an amount of damages which he had no reason to expect, and as to which, consequently, he did not take the amount of precaution which he would have done if he had had notice. The natural inference would be that a telegram sent to America was of great importance, for persons do not send trivial messages by telegraph to America. There was sufficient to put the defendant on inquiry, and if he chose to take the message without knowing what it meant, he must be taken to have made himself responsible for whatever damages might ensue. [He cited Sedgwick on Damages, 6th ed. p. 442; *Strasburgher* v. *Union Telegraph Co.* (reported in note in Sedgwick on Damages, 6th ed. p. 442); *United States Telegraph Co.* v. *Wenger*. (2)]

(1) It is unnecessary to set out the pleadings, as nothing turned upon the form of them.

(2) 55 Penns. 262.

Herschell, Q.C., supported the rule. The plaintiffs can only recover nominal damages. The telegram being in cipher the defendant cannot be considered as having any such damages as these in his contemplation. The plaintiffs, therefore, cannot recover any damages that were not the result of his negligence according to the ordinary course of things. It cannot be said that the failure to send the message in the ordinary course of things would produce the damage now sought to be recovered.

The foundation of the rule as to damages is, that if damages not the natural result of the cause of action, i.e., the result of it in the ordinary course of things, are sought to be recovered, the defendant must have had sufficient notice of the probability of such damages ensuing. The rule recognises the fact that in the course of human affairs negligence will occur; such negligence may be that of a servant and not the defendant's fault at all. The defendant is not to incur damages which may ruin him and for which the consideration may be quite inadequate, unless he has had such a notice as would give him the opportunity, if he wishes it, of taking more than the usual measure of precaution. [He cited *Playford* v. *United Kingdom Telegraph Co.* (1)]

Cur. adv. vult.

May 9. The judgment of the Court (Lord Coleridge, C.J., Brett and Lindley, JJ.), was delivered by

LORD COLERIDGE, C.J. The plaintiffs in this case were merchants in this country; the defendant a person who made his living by collecting messages and transmitting them by telegraph to, amongst other places, America. He received from the plaintiffs for transmission to New York a message, in words by themselves, entirely unintelligible, but which could be understood by the plaintiffs' correspondent in New York as giving a large order for certain goods, on which the plaintiffs, if the order had been confirmed, would have earned a considerable commission. The defendant, through admitted negligence, did not transmit the message, and the plaintiffs admittedly lost thereby considerable profits which they would otherwise have made by the transaction.

(1) Law Rep. 4 Q. B. 706.

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The action was for negligence in not transmitting the message; the verdict was for the plaintiffs, and the question arises as to the due measure of damages. The plaintiffs seek to retain the verdict for a sum intended to represent the loss of profit above mentioned. The defendant insists that such damages are not within the rule laid down in *Hadley* v. *Baxendale* (1), and ever since approved of and acted on, and that in this case there is nothing to warrant a verdict for damages more than nominal. Upon the facts of this case we think that the rule in *Hadley* v. *Baxendale* (1) applies, and that the damages recoverable are nominal only. It is not necessary to decide, and we do not give any opinion how the case might be if the message, instead of being in language utterly unintelligible, had been conveyed in plain and intelligible words. It was conveyed in terms which, as far as the defendant was concerned, were simple nonsense. For this reason, the second portion of Baron Alderson's rule clearly applies. No such damages as above-mentioned could be "reasonably supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it," for the simple reason that the defendant, at least, did not know what his contract was about, nor what, nor whether any, damage would follow from the breach of it. And for the same reason, viz. the total ignorance of the defendant as to the subject-matter of the contract (an ignorance known to, and, indeed, intentionally procured by the plaintiffs), the first portion of the rule applies also; for there are no damages more than nominal which can "fairly and reasonably be considered as arising naturally, i.e., according to the usual course of things, from the breach" of such a contract as this. No rule as to damages which is to be found in any of the cases, or in the books of Mr. Sedgwick and Mr. Mayne, will avail the plaintiffs in this case; and the cases cited to us from the American courts in which the liabilities of common carriers have been imposed on telegraph companies in America, even if correct with regard to telegraph companies, have no application to a case where the defendant is not a telegraph company, but a collector of messages to be transmitted by such a company, and the negligence complained of is his negligence and not the negligence of a company. We

(1) 9 Ex. 341; 23 L. J. (Ex.) 179.

think, therefore, that the rule should be absolute to reduce the damages to a nominal sum.

Rule absolute.

Solicitors for plaintiffs: *Stocken & Jupp, for Radcliffe & Layton.*
Solicitors for defendant: *Ridsdale and Craddock.*

BAILEY AND ANOTHER *v.* JAMIESON AND OTHERS. *Jan.* 26.

Highway—Access becoming impossible.

A way ceases to be a "public highway" where the access to it at either end has become impossible by reason of ways leading to it having been legally stopped up.

THE first count of the declaration alleged that the defendants broke and entered land of the plaintiffs at Bothal village, and broke down fences, and destroyed the herbage, &c. The second charged similar trespasses in Bothal Wood; and the third in Welbeck Wood.

Pleas,—1. Not guilty,—2, 3, and 4, a denial that the land, fences, and herbage in the first and second counts respectively mentioned belonged to the plaintiffs,—5. To the first count, a claim of a right of way,—6. To the first count, that the plaintiffs had unlawfully erected barriers, and the defendants removed them,—7 and 8. Similar pleas to the second and third counts,—9. Leave and licence. Issue.

The cause was tried before Pollock, B., at the last Newcastle spring assizes. There was evidence that there had formerly been a public foot-way, though not a very convenient or much frequented one, through certain woods held by Bailey under the Duke of Portland, called respectively Welbeck Wood and Bothal Wood, leading from a place called Sheepcot Rectory to Bothal village; but that, in consequence of other ways which led to it having been stopped by orders of the quarter sessions in September, 1873, and March, 1874, there ceased to be any access to either end of it.

Upon this evidence a verdict was entered for the plaintiffs, damages 40*s.*, upon each count, with leave to the defendants to

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move to enter the verdict for them, if the Court should be of opinion that, notwithstanding the impossibility of access to it, the way still continued to be a public highway.

A rule nisi having been obtained,

Herschell, Q.C. (*Gainsford Bruce* and *Ridley* with him), shewed cause. Although doubts have been entertained as to whether the lawful stopping up of one end of a road which has been long used as a thoroughfare, destroys its character of a public highway,—see *Wood* v. *Veal* (1); *Rex* v. *Downshire* (*Marquis*) (2),—it has never been suggested that, where a road has been lawfully stopped up at *both* ends, it remains still a public highway.

Crompton and *Littler* were called upon. It is admitted that the place in question was formerly a public highway through Bothal Wood. "It is an established maxim," says Byles, J., in *Dawes* v. *Hawkins* (3), "once a highway always a highway; for, the public cannot release their rights, and there is no extinctive presumption or prescription. The only methods of legally stopping a highway are, either by the old writ of ad quod damnum, or by proceedings before magistrates under the statute." There are several cases in which the effect of the stoppage of one end of a highway has been discussed; but this is the first time that the question has arisen with reference to the case of both ends being stopped. A highway is defined in Hawk. P. C. Book 1, c. 76, to be a way leading from town to town, which is common to all the king's subjects. "A way to a market, a great road, &c., common to all passengers, is a highway:" Per Hale, 1 Vent. 189; cited, Com. Dig. Chimin (A. 1). In *Reg.* v. *Burney* (4), it was held that a man might be indicted for a nuisance upon a public path which had been stopped at one end by the authority of an Act of Parliament, for that it was still a highway, although it had become a cul de sac. Blackburn, J., there says: "There are dicta of Patteson, J. (5), and other judges,

(1) 5 B. & Ald. 454.

(2) 4 Ad. & E. 698.

(3) 8 C. B. (N.S.) 848, 858; 29 L. J. (C.P.) 343. 7 Jur. N.S. 262.

(4) 31 L. T. (N.S.) 828.

(5) "It has been held that, where there never was a right of thoroughfare, a jury might find that no public way existed: but it has never been settled that, where there had been a public right of passing through, the right of way was abolished by stopping one end of the passage:" Per Patteson, J., in *Rex* v. *Downshire* (*Marquis*), 4 Ad. & E. 698.

that a cul de sac may be a highway, and there is authority that new openings may be made into a highway from the adjoining lands. Although this piece of unused road may be of little value, its obstruction cannot be absolutely no possible injury to any member of the public. The finding of the jury that the road is of no public utility should be an important consideration in deciding upon the punishment of the defendant, but it is not sufficient to justify him in depriving the public of a right." And Lush, J., says: "There is a public right over all or any part of a public highway; and, when a highway is stopped by sessions order or by Act of Parliament, the public are not deprived of any more of their right than the order or statute expresses."

[LORD COLERIDGE, C.J. Blackstone, vol. 2, p. 35, speaks of the king's highway, "which leads from town to town."]

Though now obstructed, can the Court say that this path has ceased to be a highway, though it possibly may become so again by new openings being made into it? In *Gwyn* v. *Hardwicke* (1) Alderson, B., says: "If the question were whether, when an Act of Parliament gave the power to stop up part of a public way, the other part is destroyed, I should say not; it may remain as a cul de sac. . . . Then, if there be no absurdity in construing the words of this Act literally, why should we not do so, and say that the part of the footpath which is not stopped up will remain a public footway?" "An ancient highway cannot be changed without an inquisition found on a writ of ad quod damnum that such change will be no prejudice to the public:" Bac. Abr. Highways (C); or by Act of Parliament: *Rex* v. *Flecknow.* (2) In *Bateman* v. *Bluck* (3) it was held that a public highway may in point of law exist over a place which is not a thoroughfare. Although the way in question has become for the present inaccessible, access to it may peradventure be opened up again through part of the land abutting on it.

LORD COLERIDGE, C.J. The question in this case is now, as far as I know, raised for the first time. It is not doubted that

(1) 1 H. & N. 49, 55; 25 L. J. (M.C.) 97.
(2) 1 Burr. 461, 465.
(3) 18 Q. B. 870; 21 L. J. (Q.B.) 406. And see *Rugby Charity (Trustees)* v. *Merryweather*, 11 East. 375, n.

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the stopping of the roads by the orders of the quarter sessions was a proper act. Those orders were not appealed from. But it is said that an unexpected consequence has followed from that stoppage, and that raises the question which we have to determine. We must take it that the roads so stopped formerly opened into another road which was not in terms stopped by the justices. But, the access to both ends of that road having become impossible, it has lost its character of a highway which it had at the time of the stoppage. Now, it is admitted that there is no authority directly in point,—none at least has been found,—to shew that a track retains the character of a highway where, by an act lawful in itself, the access to it has altogether been intercepted. We are driven, therefore, to decide this case upon principle. Now, the common definition of a highway that is given in all the text-books of authority is, that it is a way leading from one market-town or inhabited place to another inhabited place, which is common to all the Queen's subjects. Although there are no cases precisely in point, there have been some which will to a certain extent assist us, where it has been argued that a road one end of which had been lawfully obstructed ceased to be a highway, as in *Wood* v. *Veal* (1) and *Rex* v. *Downshire* (*Marquis*). (2) The conclusion to which the Court came in those cases was that the stoppage of one end did not make a road cease to be a common highway; for, though it thereby became a cul de sac, the public still might have a right to go over it to the end and back. These cases do not decide the point now before us: still they assist us to this extent, that, to constitute a highway, there must be some notion of a passage which begins somewhere and ends somewhere, and along which the public have a right to drive or to walk from its beginning to its end. Here, that notion is entirely absent. By proper authority this way has become inaccessible at both ends. It remains a track which no member of the public can legally get upon, and therefore the defendants have failed to justify their presence there. If the defendants had a right to be there, though they got there by an act of trespass, they would not be trespassers for being there. It is necessary, therefore, to determine whether or not it remains a highway. I am of opinion that it does not. Its character of a

(1) 5 B. & Ald. 454. (2) 4 Ad. & E. 698.

public highway is altogether gone. The rule to enter a verdict for the defendants will therefore be discharged.

DENMAN, J. I am of the same opinion. The great difficulty here seems to arise from the familiar dictum "once a highway always a highway," and from the necessity of now for the first time placing a limitation upon it. But I think we are compelled to hold that this is a case where that which formerly was a highway, but which, though it has not been stopped by statutory process, has, by reason of legal acts at either end of it, ceased to be a place to which the Queen's subjects can have access, loses its character of a highway. The cases cited, and others to the same effect, shew that where a public highway has, by reason of an Inclosure Act, or by other lawful means, been stopped at one end, and so converted into a cul de sac, it does not therefore cease to be a highway. But, where both ends are stopped, so that no one can have access to any part of it without committing a trespass, I see no difficulty in holding that it is no longer a highway. Dealing as we are with a short piece of foot-path, I do not think the arguments ab inconvenienti which have been urged by the defendants' counsel should weigh with us, so as to prevent us from coming to the logical conclusion that this way has ceased to be a public highway.

LINDLEY, J. I am of the same opinion. Mr. Herschell's argument amounts in substance to this, that there cannot be a public highway public access to which has lawfully been stopped at either end. I agree to that. At the same time I am desirous of guarding myself against being supposed to suggest that a public highway can legally be destroyed without resort to the proper statutory means.

Rule discharged.

Solicitors for plaintiffs: *Bailey, Shaw, Smith, & Bailey, for G. & F. Brumell, Morpeth.*

Solicitor for defendants: *Brownlow, for Keenlyside & Forster, Newcastle.*

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Feb. 15, 28.

Writ under Bills of Exchange Act, 1855 (18 & 19 *Vict. c.* 67)—*Notice to appear in District Registry—Judicature Act*, 1873, *s.* 64—*Judicature Act*, 1875, *Order II., Rule* 6; *Order V., Rule* 1.

A writ under the Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67), may issue out of a district registry; and, in that case, notwithstanding neither party resides or carries on business within the district, the notice may require the defendant to apply for leave to appear, and to appear in the district registry without suggesting that he may obtain leave to appear in London.

Where, however, a defendant is served with a writ issued out of a district registry within the jurisdiction of which he neither resides nor carries on business, he may (under Order XXXV., Rule 1) obtain an order of the Court or a judge to have the subsequent proceedings taken in London.

On the 31st of January, 1876, the defendant, the acceptor of a bill of exchange for 102*l.* 2*s.* 2*d.* drawn by the plaintiff at St. Malo (where he resided) on the 13th of November, 1875, payable on the 4th of December, was at his residence at Newcastle-upon-Tyne personally served with a writ of summons issued out of the Manchester district registry, in the form given in Schedule A. of the Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67), save that the "Notice" indorsed thereon was as follows:—

Take notice that, if the defendant do not obtain leave from *the district registrar at Manchester* within twelve days after having been served with this writ, inclusive of the day of such service, to appear thereto, and do not within such time cause an appearance to be entered for him *in the office of the said district registrar*, the plaintiff will be at liberty at any time after the expiration of such twelve days to sign final judgment for any sum not exceeding the sum above claimed, with interest as above specified, and the sum of 4*l.* or such further sum as shall on taxation be allowed for costs, and issue execution for the same.

Leave to appear may be obtained on application at *the office of the registrar for the Manchester district*, 57, *King Street, Manchester*, supported by affidavit shewing that there is a defence to the action on the merits, or that it is reasonable that the defendant should be allowed to appear in the action.

A summons was taken out at chambers calling upon the plaintiff to shew cause why the writ should not be set aside for irregularity, on the ground,—1, that, the action being under the Bills of Exchange Act, 18 & 19 Vict. c. 67, the writ could not issue out of a district registry,—2, that the writ was informal, inasmuch as it contained no statement on the face of it that the defendant might cause an appearance to be entered, at his option, either at the

district registry or the London office, as required by Order V., Rule 2. The learned judge referred the matter to the Court.

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Gainsford Bruce moved accordingly. The ordinary writ of summons under the Judicature Act, 1875, is, by Order II., Rule 3, to be in the form given in Schedule 1, Appendix A., No. 1, and Rule 6 provides that, "with respect to actions upon a bill of exchange or promissory note commenced within six months after the same shall have become due and payable, the procedure under the Bills of Exchange Act, 18 & 19 Vict. c. 67, shall continue to be used." This is not an ordinary writ of summons; nor is it quite in the form of a writ under the Bills of Exchange Act. Order V., Rule 1, provides that, "in any action other than a probate action, the plaintiff, wherever resident, may issue a writ of summons out of the registry of any district." That means the ordinary writ of summons. Rule 2 provides that, "in all cases where a defendant neither resides nor carries on business within the district out of the registry whereof a writ of summons is issued, there shall be a statement on the face of the writ of summons that such defendant may cause an appearance to be entered, at his option, either at the district registry or the London office, or a statement to the like effect." The service of the writ is provided for by Order IX., Rule 2 of which is that, "when service is required, the writ shall, wherever it is possible, be served in the manner in which personal service is now made, but if it be made to appear to the Court or to a judge that the plaintiff is from any cause unable to effect prompt personal service, the Court or judge may make such order for substituted or other service, or for the substitution of notice for service, as may seem fit." Under the Bills of Exchange Act, the service *must* be personal. Order XII., Rule 1, provides that, "except in the cases otherwise provided for by these rules, a defendant shall enter his appearance in London;" Rule 2, that, "if any defendant to a writ issued in a district registry resides or carries on his business within the district, he shall appear in the district registry;" Rule 3, that, "if any defendant neither resides nor carries on business in the district, he may appear either in the district registry or in London;" and Rule 6, that "a defendant shall enter his appearance to a writ of summons by delivering to

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the proper officer a memorandum in writing, dated on the day of the delivery of the same, and containing the name of the defendant's solicitor, or stating that the defendant defends in person;" and that "a defendant who appears elsewhere than where the writ is issued shall on the same day give notice to the plaintiff of his appearance, either by notice in writing served in the ordinary way or by pre-paid letter, posted on that day in due course of post."

[BRETT, J. That is, if and when he has obtained leave to appear.]

Forms of indorsement on writs are given in Sched. 1, App. A., but no form is given for a writ under the Bills of Exchange Act.

[BRETT, J. But the indorsement is to be "with such variations as circumstances may require:" Order II., Rule 3.]

But not so as to alter the substance of the document. The procedure under the Bills of Exchange Act is an entirely different procedure. It never could have been intended that a defendant who resides out of the jurisdiction of the local registry should be compelled to obtain leave to appear there and not elsewhere. In the case of a bill of exchange, all the proceedings relating to the writ and to the appearance thereto are still to be regulated by the Bills of Exchange Act.

Arthur Wilson shewed cause. The question depends upon s. 64 of the Judicature Act of 1853, Order V., Rule 1, and Order II., Rule 6. Sect. 64, which provides for proceedings in district registries, enacts that, "subject to the rules of Court in force for the time being, writs of summons for the commencement of actions in the High Court of Justice shall be issued by the district registrars when thereunto required; and, unless any order to the contrary shall be made by the High Court of Justice, or by any judge thereof, all such further proceedings, &c., as may and ought to be taken by the respective parties to such action in the said High Court down to and including entry for trial, &c., may be taken before a district registrar, and recorded in the district registry, in such manner as may be prescribed by Rules of Court." Order II., Rule 6, provides that, "with respect to actions upon a bill of exchange or promissory note commenced within six months after the same shall have become due and payable, the procedure under the Bills of Exchange Act, 18 & 19 Vict. c. 67, shall continue to

be used." The form of writ given in that Act has an indorsement thereon intimating that leave to appear may be obtained "at the judges' chambers, Serjeants' Inn, London." Now, Order V., Rule 1, provides in the broadest terms that, "in any action other than a probate action, the plaintiff, wherever resident, may issue a writ of summons out of the registry of any district." The real question is, what is the meaning of Rule 6 of Order II. It is, that the procedure in actions on bills of exchange, so far as relates to the act itself, that is, the form of the writ, the requirement of personal service, and the necessity for obtaining leave to appear, must be observed. There is nothing inconsistent with that, that the writ may issue from a district registry, and the leave to appear be obtained there. The Bills of Exchange Act, 1855, has been by Order in Council applied to the county courts. (1) In an *Anonymous Case* (2), Quain, J., at chambers, held that a service upon one of two partners, in an action upon a bill of exchange, was not a good service under Order II., Rule 6. But, Lindley, J., in another *Anonymous Case* (3), allowed a third party to be added as a defendant in a similar action, after the original defendant had obtained leave to appear, and a statement of claim had been delivered.

[BRETT, J. I do not see why a personal service upon one of two partners should not be good service under the Bills of Exchange Act.]

Then, as to the mode of obtaining leave to appear. Where a writ has issued from a district registry, in the absence of any order to the contrary, all further proceedings in the action down to and including entry for trial *may* be taken before the district registrar and recorded in the district registry: 36 & 37 Vict. c. 66, s. 64. And by Order XXXV., Rule 1, it is provided that, "where an action proceeds in the district registry, all proceedings, except where by these rules it is otherwise provided, or the Court or a

(1) The Bills of Exchange Act, 1855, was applied to the county courts by an Order in Council of January 30th, 1856, in respect of actions upon bills of exchange, where the sum claimed does not exceed 50*l*. But a subsequent Order of July 27th, 1863, prevents suitors from proceeding in the county courts under the Bills of Exchange Act, where the amount sued for is less than 10*l*.: see Davis's County Court Practice, 5th ed. 190, n.

(2) W. N. 1875, p. 248. See acc. *Pollock* v. *Campbell*, 1 Ex. D. 50.

(3) W. N. 1876, p. 23.

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judge shall otherwise order, *shall* be taken in the district registry, down to and including the entry for trial of the action or issues therein," &c. Here, the action is proceeding in the Manchester district registry. In the absence of an order of the Court or a judge to the contrary, the district registrar there alone can give the defendant leave to appear.

[BRETT, J. Inasmuch as a judge at chambers might give the defendant leave to appear in London, ought not the notice to have contained a statement to that effect?]

The form given in the schedule is peremptorily required to be followed by s. 1 of the Bills of Exchange Act, 1855.

[BRETT, J. Order V., Rule 3, provides that the writ of summons for the commencement of an action "shall, except in the cases in which any different form is hereinafter provided, be in Form No. 1 in Part I. of Appendix A. hereto, *with such variations as circumstances may require.*" You modify the form for your own purposes: why not do so for the purpose of giving more accurate information to the defendant?]

Order V., Rule 3, is dealing with an ordinary writ of summons. It would be a strong thing to hold that the plaintiff is irregular for not framing a writ which is not provided for by the Act or the rules.

[BRETT, J. The Court of Common Pleas at Lancaster was a superior Court with a limited jurisdiction. Has that Court exceptional privileges still?]

The powers and duties of that Court, as well as those of the Court of Pleas at Durham, are preserved in a qualified manner by s. 78 of the Judicature Act, 1873.

Bruce, was heard in reply.

BRETT, J. The first question in this case is, whether a writ issued subject to the conditions prescribed in the Bills of Exchange Act, 1855, is to be considered as a writ also subject to the enactments and rules of the Judicature Acts. I think the Bills of Exchange Act did not make a new writ, but that by that Act the common-law writ was made subject to certain conditions. If and when those conditions were fulfilled, the writ became an ordinary common-law writ. The words of s. 64 of the Act of 1875 are

large enough to comprise a writ under the Bills of Exchange Act; and the words of Order V., Rule 1, of the Act of 1873 are also large enough to comprise it. There is also great force in the remark of Mr. Wilson, that the only action which is out of the operation of that rule is the Probate action. I think the only reasonable way of construing the two Acts is, to hold that the writ under the Bills of Exchange Act is a writ which is subject to the provisions and rules of the Judicature Acts as well to those of the Act of 1855. It therefore seems to me that a writ issued subject to the conditions of the Bills of Exchange Act may, because it is a writ under the Judicature Act, be issued out of a district registry. Then comes the question, what is to be the form of a writ so issued. It must be in the form given in the schedule to the Bills of Exchange Act. It cannot direct the defendant to appear. It rightly leaves that out, and tells him how he is to get leave to appear. Then comes the more difficult question, where he is to appear, if he neither resides or carries on business within the district. The privilege of the defendant in that case is, that he may appear either in London or in the district registry. (1) By this form of notice, the defendant is deprived of this privilege by limiting his application for leave to appear to the district registrar at Manchester. That, however, must be so for the present, because no order has yet been made to deal with that matter, and Order XXXV., Rule 1, provides that, "where an action proceeds in the district registry, all proceedings, except where by these rules it is otherwise provided, or the Court or a judge shall otherwise order, shall be taken in the district registry down to and including the entry for trial of the action or issues therein." If this writ is one which may be issued out of the district registry, the obtaining leave to appear is a proceeding not otherwise provided for by the rules. It seems to me, therefore, that leave to appear must be obtained in the district registry unless the Court or a judge shall otherwise order. The defendant was at liberty to apply to a judge at chambers for leave to appear in London. If such an order were obtained, he might, I apprehend, if neither

(1) In *Ibbotson* v. *Whitworth*, W. N. 1876, p. 10, it was held by Lindley, J., at chambers, that a defendant who had appeared in the district registry could not properly pay money into Court in London.

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resident nor carrying on business within the district, have appeared in London. For these reasons I think the writ is correct in point of form. I also think, that, in order to carry out the governing principle of the Judicature Acts, we are bound to construe it and the rules made under it so that they may harmonize with the Bills of Exchange Act in this respect. There will therefore be no rule.

ARCHIBALD, J. I am of the same opinion. We are bound, if possible, to read the two enactments so as to make them consistent. All proceedings are now to be by action: Order I., Rule 1. Every action in the High Court shall be commenced by a writ of summons: Order II, Rule 1. The writ of summons for the commencement of an action shall, except in the cases in which any different form is provided, be in the form given in the schedule, " with such variations as circumstances may require: Order II., Rule 3. Rule 6 of the same order provides that, with respect to actions upon a bill of exchange or promissory note, commenced within six months after the same shall have become due and payable, the procedure under the Bills of Exchange Act, 18 & 19 Vict. c. 67, shall continue to be used. Reference has already been made to s. 64 of the Act of 1873, which allows writs of summons to be issued out of district registries. Where a plaintiff in a district registry seeks to avail himself of the proceeding under the Bills of Exchange Act, he must necessarily make " variations " in the form of the writ so as to carry into effect the provisions of both Acts. The peculiarity of the Bills of Exchange Act is that it assumes that the party sued upon the bill is primâ facie liable. The writ is a writ under the provisions of the Judicature Act, 1875; and it may be issued out of a district registry. The question is, what notices are to be given. I think the Acts authorize a statement on the back that the defendant is to apply for leave to appear in the district registry, unless he obtains from the Court or a judge leave to appear in London, under Order XXXV., Rule 1. Then it is said that, as the defendant resides out of the district, the writ should have had on the face of it a statement that he might cause an appearance to be entered at his option either at the district registry or the London office, pursuant to Order V., Rule 2. Now, inas-

much as the notice is that, unless the defendant obtains leave to appear within twelve days in the district registry, judgment will be signed against him, it seems idle to give him notice of the option under Order V., rule 2. Upon the whole, I think the writ in this case properly carries out the provisions of the Bills of Exchange Act so far as they will harmonize with those of the Judicature Acts.

LINDLEY, J. I am of the same opinion. Two questions arise here,—1. Whether the Bills of Exchange Act, 1855, can be carried into effect by a writ of summons issuing out of a district registry, under s. 64 of the Act of 1873,—2. What is to be the form of such a writ? As to the first point, we must take s. 64 of the Act of 1873, Order V., Rule 1, and s. 21 of the Act of 1875 (1) together; and, so reading them, it is plain that this writ could properly issue out of a district registry. It is said that Order II., Rule 6, is inconsistent with that. That rule, however, does not seem to me to express any more than was already expressed in s. 21. We must so construe these Acts and the rules as to form, if possible, a consistent and uniform code of procedure. As to the form of the writ, I must confess that it did at first seem to me to be a little misleading, in not giving the defendant notice that he had an option to appear either in the district registry or in London. I think, however, that difficulty is answered by a reference to Order XXXV., Rule 1. I therefore agree with the rest of the Court in thinking that the writ here was properly issued out of the district registry, and is good in form.

Rule refused, without costs.

(1) Which enacts that, "save as by the principal Act or this Act or by any rules of Court may be otherwise provided, all forms and methods of procedure which at the commencement of this Act were in force in any of the Courts whose jurisdiction is by the principal Act or this Act transferred to the said High Court and to the said Court of Appeal respectively, under or by virtue of any law, custom, general order, or rules whatsoever, and which are not inconsistent with the principal Act or this Act, or with any rules of Court, may continue to be used and practised in the said High Court of Justice and the said Court of Appeal respectively, in such and the like cases and for such and the like purposes as those to which they would have been applicable in the respective Courts of which the jurisdiction is so transferred, if the principal Act and this Act had not passed."

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Feb. 28. *Bruce*, asked for leave to appeal.

Wilson, contrà, observed that it was a mere question of procedure; and he asked for costs, inasmuch as he appeared in pursuance of notice.

ARCHIBALD, J. We decline to assist the defendant.

Motion refused, with costs.

Solicitor for plaintiff: *T. W. Goldring.*
Solicitor for defendant: *John C. Needham.*

May 10.

[IN THE COURT OF APPEAL.]

RICHARDSON *v.* THE GREAT EASTERN RAILWAY COMPANY.

Railway Company—Negligence—Defect in Truck—Foreign Truck—Duty to examine.

The defendants, a railway company, have a junction at Peterborough, at which they receive from other lines a great number of trucks, which they, being bound by law to give facilities for through traffic, are compelled to forward with dispatch to their destination. The defendants, when a foreign truck comes on their line, cause it to undergo such a general examination as can take place without causing an undue delay, that is to say, the tires of the wheels are tapped with a hammer, and the truck generally looked over for defects.

A foreign truck, loaded with coal, belonging to the B. Waggon Company, came on to the defendants' line at Peterborough, and there underwent the usual examination, when a defect in one of the springs and a crack in the woodwork was discovered. The truck was shunted, upon the discovery of the defects, in order that it might be repaired by the waggon company to whom it belonged. The defect in the spring, which was the only pressing defect, was repaired, and the truck was handed over to the defendants, and sent on by them to its destination. On the way an accident, by which the plaintiff was injured, happened through the existence of a crack in one of the axles of the truck. It was stated in evidence that by a minute examination of the truck the crack in the axle might have been discovered. The defect in the axle was entirely unconnected with the defects previously discovered. The jury, in answer to questions left them by the judge, found that the crack in the axle might have been discovered by a sufficiently minute examination; but that the defendants were not bound to examine the truck minutely, so as to enable them to see the crack. In answer, however, to a third question left to them, viz. as to whether, although it might not be the defendants' duty on the first view of the truck to examine it minutely, it did not become their duty to do so upon discovery of the defects in the spring and woodwork, the

jury answered that it was their duty to require from the waggon company some distinct assurance that the truck had been thoroughly examined and repaired :—

Held, reversing the decision of the Court below, that on these findings the defendants were entitled to a verdict; for the defendants were not bound to do more in the way of examining the foreign truck on its arrival at Peterborough than they had done, and inasmuch as the defects discovered on such examination were entirely unconnected with the defect that caused the accident, they were not responsible by reason of their failing upon the discovery of such defects to enter upon a more minute examination of the truck, or to make any such inquiry of the waggon company, as suggested by the finding of the jury.

APPEAL from the decision of the Court of Common Pleas, making absolute a rule to enter the verdict for the plaintiff for 250*l.*

The facts are fully set forth in the report of the case in the court below (Law Rep. 10 C. P. 486).

Hawkins, Q.C., Parry, Serjt., and *Marriott*, for the defendants.
Biron, and *Lush*, for the plaintiff.

It is unnecessary to set out the arguments, which were substantially the same as in the court below.

JESSEL, M.R. This is an appeal from the judgment of the Common Pleas Division, directing a verdict to be entered for the plaintiff for 250*l.* damages.

The question to be decided is whether there was any negligence proved on the part of the defendants. The outline of the facts, as proved, is as follows :—A coal truck belonging to the Birmingham Waggon Company, but which had been let to a colliery company, came on to the defendants' line at Peterborough. The defendants are compelled by statute to forward foreign traffic, i.e. through traffic, from other lines. It seems to me that the railway company are bound to take reasonable care to ascertain that trucks belonging to other companies and persons so coming on their line are in such a state as to travel safely. They must therefore use due diligence in the examination of such trucks, and the question is whether, on the facts in this case, that obligation was discharged. As to this question, the evidence was substantially this. At Peterborough there are every week a very great number of trucks sent along the defendants' line from other lines. An examination is made of such

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trucks by servants of the company appointed for the purpose; it has been called a "cursory" examination; it is not an examination of a very minute character; that would be practically impossible; but certain precautions are taken by the workmen employed on this duty, which are usually taken by railway companies in such cases, and are generally found by experience to be sufficient. All these usual precautions were adopted here, and two defects were discovered, one being that a spring had lost its camber, and the other a crack in the woodwork, which was not so material. Notice of the first defect was given to the Birmingham Waggon Company, which had a workshop near Peterborough, that they might get that defect remedied; and with regard to the other defect, it being inconvenient to unload the truck, without which the defect could not be remedied, and it being unnecessary to remedy it immediately, as it did not interfere with the safety of the truck, that defect was left to be remedied subsequently. The truck was accordingly shunted, that the spring might be repaired, and on its return to the defendants, their servant ascertained that the repair had been done, and examined the truck in the usual way, to see that there was no other defect. It was then sent on, and the accident occurred through a defect in no way connected with the two defects previously mentioned, viz. a defect in the axle. The real question is, whether the company were guilty of negligence in not making a more minute examination; for there is no doubt that, the crack, having reached the surface, might have been discovered by a sufficiently minute examination. We must look to what is reasonable in reference to the exigencies of the case. The company cannot stop all foreign trucks and empty them for the purposes of a minute examination. If they were entitled to do so, it would practically destroy the right given by statute to other companies of having the through traffic forwarded, and give a monopoly to the company itself. The suggestion that they should do this is too absurd to bear discussion. It cannot be said that it is obligatory on the company so to treat the foreign trucks as to destroy the very object for which they were sent on to the line, viz. for the purposes of through traffic. There must be some reasonable limit to the amount of examination required, and the substantial question was whether the mode of examination adopted

by the company was reasonably satisfactory. It appears to me that the jury did answer that question substantially in the defendants' favour. Three questions were put to the jury; the first was, whether the defect in the axle would have been discovered upon any fit and careful examination of it which it might have been subjected to. The jury answered, yes. The second question was, whether it was the duty of the defendants to examine the axle by scraping off the dirt and minutely looking at it—so minutely as to enable them to see the crack—and so to prevent or remedy the mischief. The jury answered, no. The third question was, whether, if that was not their duty upon the first view of the truck, it became their duty so to do when, upon having discovered the defect (in the spring and in the side of the truck), they ordered it to be repaired, and it remained for four or five hours on their premises for that purpose. The jury answered, "It was their duty to require from the Birmingham Waggon Company some distinct assurance that it had been thoroughly examined and repaired." The meaning of the last question appears to be this; assuming that it is not in general incumbent on the company to do more in the case of foreign trucks than they did here, still a defect having been discovered, did that throw on them a duty to do more? I think there can be only one answer to that question. If the defect discovered were such as ought reasonably to induce a person of experience to think that some other defect existed, or was likely to exist, then there would be a duty to examine further, but if the defect discovered had no probable connection with any other undiscovered defect, then I see no reason why any further or other examination should be made. Now I read the answer of the jury to the third question as meaning that there was no such duty as suggested by the question, but that the defendants ought to have inquired. But there was no evidence on which they were entitled to find that such a duty existed, or that it had been neglected. It is not for the jury to lay down an absolute duty such as this, irrespective of the case and the evidence laid before them. It is impossible to make that answer a foundation for a verdict against the defendants. If it was the defendants' duty to inquire, it could only be because they were bound to satisfy themselves of the fitness of the trucks, and if so bound, they could not exonerate

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themselves by mere inquiry of the waggon company. If it had been proved that they relied on mere inquiry, I am not sure that might not, per se, be evidence of negligence. I do not think we ought to give any effect to this finding of the jury, and the case for the plaintiff therefore fails. The judgment must therefore be reversed.

MELLISH, L.J. I am of the same opinion. The question depends on the nature of the defendants' obligation with regard to what are called foreign trucks, i.e. trucks sent on to their lines by other companies. They are bound in point of law to carry on these trucks to their destination, unless they can shew some good reason for refusing. The plaintiff has, in order to make out that the action is maintainable, to shew two things: first, that the defect in the axle of the foreign truck, through which the accident happened, was discoverable, for if the defect was undiscoverable, clearly the defendants could not be liable; secondly, that the defendants were in fault in not discovering it. It was shewn by the evidence on the part of the railway company, which was substantially uncontradicted, that a very great number of trucks come through Peterborough every week; and that it is impossible that they should be examined minutely, but a mode of examination is adopted which in practice is generally found sufficient to disclose defects if any exist. It was practically undisputed by the plaintiff's counsel, that, if the usual examination having been made, no defects had been discovered, there would have been no case against the defendants, but it was said that, upon a defect being discovered by the usual examination, the truck ought then to have been thoroughly overhauled. The Chief Baron put two questions with regard to this part of the case, viz. the second and third questions. The second question was, whether it was the duty of the defendants to scrape off the dirt and examine the axle minutely. That question the jury answered in the negative. The third question seems to me to ask whether, assuming that there might not in general, or in the first instance, be such a duty, there was such a duty under the particular circumstances of the case; i.e. whether the discovery of the defect on the cursory examination made it the duty of the company to examine more minutely. It seems to

me, having regard to the finding on the second question, that the jury, by their answer to the third question, meant to negative the existence of the duty to examine more minutely as they had done in their answer to the second question; but they add a finding, that it was the duty of the defendants to have inquired of the waggon company as to the repairs. What effect are we to give to that finding? It was never alleged by the plaintiff that it was the duty of the defendants to inquire of the waggon company. There was not a single witness who said that it was in the usual course of business, or a proper thing, to make such an inquiry. We cannot, I think, give any effect to a mere suggestion of the jury respecting a matter as to which they were not asked, and as to which there was no evidence before them. If it had been put to the jury that there was such a duty, an answer would have very easily suggested itself. It would be urged that it would be a very foolish thing to place any confidence in such an inquiry. The people who send the waggons will always say that they are in good repair. I think, therefore, that this finding must be disregarded, and that we can only consider the substantial effect of the finding as an answer to the question put, and, as I have already said, I think it negatives the existence of the duty.

I cannot help thinking that the decision in the Court below proceeded on some misapprehension of the facts, and there are expressions in the Lord Chief Justice's judgment which would seem to shew that he was under the impression that the repairs for which the truck was stopped at Peterborough were general repairs, whereas it seems clear that there was no question of repair at Peterborough other than with respect to the spring and the crack in the side of the truck. The spring was, in fact, repaired, and the crack in the side, though it remained unrepaired, had no connection whatever with the failure of the axle, through which the accident did occur. For these reasons, I think, there was no evidence of negligence on the defendants' part, and the decision of the Court below must be reversed.

POLLOCK, B. I agree that the verdict should be entered for the defendants. My only doubt has been whether it would be

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necessary to have a new trial, for if there were any evidence of negligence fit to be submitted to a jury we could not properly enter a verdict for the defendants. I am now satisfied, however, there was no sufficient evidence of negligence on the defendants' part. The only sensible construction of the answer to the third question appears to me to be that the jury intended to negative the duty as to which the question was asked, but they added to that negative a finding that the defendants ought to have inquired of the company. It seems obvious that that must have been their meaning, for the two duties, the duty to examine for themselves and the duty to inquire, could hardly co-exist.

It seems to me that the third question was unnecessary. If, on the whole of the evidence, it had appeared that there was any connection, or probability of connection, between the defects discovered, i.e. the defects in the spring and the side and the defects in the axle, the case would have been different, and the question might have been material. It appears to me impossible to impose on the defendants the duty of making a minute examination of the whole truck because defects have been discovered in some part of the truck which have no connection with the probable existence of defects in any other part of the truck. For these reasons, I also think the judgment should be reversed.

Judgment reversed.

Solicitors for plaintiff: *Freeman & Bothomley, for Kelsey & Son.*
Solicitor for defendants: *W. H. Shaw.*

BRANTOM *v.* GRIFFITS AND OTHERS.

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May 17.

Bill of Sale, what amounts to—Bills of Sale Act, 17 & 18 *Vict. c.* 36, *ss.* 1, 7—*Growing Crops—"Capable of complete Transfer by Delivery."*

Growing crops are not personal chattels within the Bills of Sale Act.

A contract in writing for the sale of personal chattels, if the property passes by the contract, is a transfer or assurance of personal chattels within the Bills of Sale Act.

Affirmed 2 C.P.D. 212. C.A.

INTERPLEADER issue, in which the plaintiff claimed as against the defendants, execution creditors, certain horses and growing crops seized upon the farm occupied by the execution debtors.

The case was heard before Lindley, J., at the last spring assizes for Buckinghamshire, when the facts were as follows:—

A farm was occupied by three sisters named Miles, but Adelaide, one of the sisters, appeared to have had the management of the business. On the 13th of January, 1875, the execution debtors being in want of money, the plaintiff agreed to advance the amount required in consideration of a sale to him of certain growing crops. The following document was executed in pursuance of such arrangement:—

"Miss A. Miles, of, &c., hereby agrees to sell to William Brantom, of, &c., five acres of wheat, now standing in the Beeches, adjoining to Mr. Smith's, Drayton side, at the sum of 6*l.* per acre, the said William Brantom to cut and carry the corn any time he may require; and the said William Brantom doth hereby agree to purchase the said five acres of corn as mentioned above on the above conditions.

"Adelaide Miles.
"William Brantom."

On the 5th of March, 1875, a similar transaction took place, and a document was executed in the following terms:—

"Miss A. Miles, of, &c., hereby agrees to assign to William Brantom, of, &c., three acres of wheat now standing in the Beeches, adjoining the piece bought before [here followed further description], at the sum of 6*l.* per acre, the said William Brantom to cut and carry the corn any time he may require; and the

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said William Brantom doth hereby agree to purchase the aforesaid three acres of corn mentioned above on the aforesaid conditions.

"Adelaide Miles.
"William Brantom."

Subsequent sales of growing crops under similar circumstances, and in respect of which similar documents were executed, took place between the parties.

On the 28th of June, 1875, the execution debtors were distrained upon for rent, and applied to the plaintiff for further sums of money. It was arranged that the plaintiff should pay out the distress, and in return for the advance a further sale of growing crops took place, and it was also arranged that some horses should be transferred to the plaintiff. The document executed as to the crops was similar to those above set out. With regard to the horses the following document was executed :—

"Memorandum of agreement between William Brantom, of, &c., and Miss Miles, of, &c. I, William Brantom, hereby agree to take to the gray mare and two colts, and nag mare, and the black mare, now belonging to Miss A. Miles, for the amount of 80*l.*; the said William Brantom to take possession, and the said Miss Miles to authorize the said William Brantom to do the same. I, Miss Miles, hereby agree to assign the above-mentioned stock to William Brantom on the above conditions.

"William Brantom.
"Adelaide Miles."

The crops and horses which formed the subject of the above transactions remained on the farm premises, and were seized there. The defendants having obtained a judgment against the Misses Miles, issued a fi. fa. on the 30th of July, and the seizure was made shortly afterwards.

Upon these facts it was objected by the defendants' counsel (inter alia) that the documents above mentioned were bills of sale, and void under the Bills of Sale Act for want of registration.

The verdict was entered for the defendants, leave being reserved to the plaintiff to move to enter it for the plaintiff for the sum

that had been paid into Court under the interpleader order as the value of the goods.

Merewether and *Young Clare* moved in pursuance of the leave reserved, and to enter judgment for the plaintiff. These documents are not bills of sale. They are not transfers or assurances of personal chattels. They are merely memoranda of agreements of sale, evidence of the contract of sale, but not constituting the contract itself. If it be otherwise, in every case where there is a sale within the Statute of Frauds, and a memorandum of the bargain is given to satisfy the statute, if such memorandum is not registered as a bill of sale, and the goods are left in the possession of the vendor more than twenty-one days, the Act applies, and the execution creditor of the vendor can seize the goods. An instrument, to be within the section, must be an instrument by which the property purports to pass. The property in such a case passes by the previous contract itself, not by the memorandum, which is not the contract, but merely evidence of it.

Secondly, with regard to the growing crops, they are not personal chattels, and so are not "goods" at all within the Act. And if they could be considered as "goods," they are not goods capable of complete transfer by delivery within the meaning of the 7th section.

[They cited *Allsop* v. *Day* (1); *Byerley* v. *Prevost* (2); *Wake* v. *Harrop* (3): *Sheridan* v. *McCartney* (4); and *Gough* v. *Everard.* (5)]

Metcalfe, Q.C., and *Collyer* shewed cause. These documents are assurances of personal property within the Bills of Sale Act. It is clear that sales may be within the Act, because sales in the ordinary way of business, which this was not, are expressly excepted. The writing here is the contract, and by such contract the property passed.

With regard to the growing crops, it is contended that they are goods capable of complete transfer by delivery within the 7th sec-

(1) 7 H. & N. 457; 31 L.J. (Ex.) 105.
(2) Law Rep. 6 C. P. 144.
(3) 1 H. & C. 202; 31 L.J. (Ex.) 451.
(4) 11 Ir. C. L. 506.
(5) 2 H. & C. 1; 32 L. J. (Ex.) 210.

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tion. Growing crops are goods and chattels as between the heir and executor and the executor and remainderman. They may be taken in execution and as a distress, and a sale of them is within the 17th, and not within the 4th, section of the Statute of Frauds.

[BRETT, J., referred to Williams on Executors, 7th ed. p. 709, where growing crops are said, in a note, to be for "most" purposes personal property.]

They are capable of complete transfer by delivery. There may be a symbolical delivery of them: a man might be put in possession in respect of them whilst they were growing, and until they arrived at maturity. They are clearly within the mischief of the Act, for the occupier of the land appears to be in possession of them whilst they remain on the land. The case of *Sheridan* v. *McCartney* (1) is a distinct authority that growing crops are within the Act.

[They also cited *Jones* v. *Flint* (2); *Newman* v. *Cardinal* (3); *Marshall* v. *Green* (4); Dalton's Executor, p. 556; *Peacock* v. *Purvis* (5); Comyns, Digest, tit. Biens, A. 2.]

Merewether, in reply. The definition of "apparent possession" clearly shews that growing crops are not within the statute. That taken with the words "capable of complete transfer by delivery," shews that what was contemplated was the case where goods that might be delivered were left in the use and enjoyment of the transferor, notwithstanding that formal possession had been given. Growing crops cannot be delivered, and cannot be used and enjoyed. The term "formal possession" has no application to them.

BRETT, J. The argument for the defendants is, admitting that there was no fraud, and a bonâ fide sale was intended of the articles now in question, that the documents which have been laid before us amount to bills of sale within the meaning of the Bills of Sale Act, 17 & 18 Vict. c. 36; and as they were not registered,

(1) 11 Ir. C. L. (N.S.) 506.
(2) 10 A. & E. 753.
(3) 2 F. & F. 840.
(4) 1 C. P. D. 35.
(5) 2 B. & B. 362.

and the goods remained in the possession of the vendors, the transaction is void as against the execution creditors. This argument resolves itself into two points. The first question is, whether, assuming that the subject-matter of the transactions was within the Act, these documents amounted to bills of sale within its provisions. It is argued for the plaintiff that they are not bills of sale, and do not come within the description of instruments mentioned in the 7th section. The contention is that there was a good verbal contract apart from the documents under which the property passed; and the documents do not constitute the contract itself, but are only evidence of it. It seems to me that, although there may have been such a verbal contract, and although money may have been paid under it, and so a writing would not be essential, yet, if the terms of the contract are at the time, as here, reduced into writing and signed by the parties, and the writing contains all the terms of the contract, and those terms are such as would pass the property in the subject-matter of the contract, such a document is a transfer or assurance of personal chattels within the 7th section. That being so, inasmuch as the property was left in the possession of the execution debtors for more than twenty-one days, it follows, if the subject-matters of the contracts were within the Act, the contracts ought to have been registered, and, not being registered, are void as against the execution creditors.

Now, the horses are clearly personal chattels within the Act, and must therefore go to the defendants; but as to the growing crops a difficult question is raised, which constitutes the second point argued before us. If growing crops were goods and chattels in contemplation of law for all purposes, they must be within the Act, and the documents as to them must be registered. So, also, if they were never goods and chattels in the contemplation of the law, the opposite result would follow. But it seems to me that the result of the authorities is that, though for certain purposes and under certain conditions they are goods and chattels, they are not so for all purposes, and therefore we must inquire further. The learned author of Williams on Executors, 7th ed. p. 709, lays it down that growing crops, as between the executor and heir,

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and the executor and the remainderman, are personal property, and says that for most other purposes also they are personal property, but he does not say that they are so for all purposes. They may be taken in execution and under a distress, but I take it that, as between vendor and purchaser, they would pass, by a conveyance of land, as part of the land without express words; if so, for that purpose they are realty, and not goods and chattels. It follows from this that they cannot be said to be within the Act, on the ground that they are mere personal goods and chattels for all purposes. Neither can it be said that they are necessarily excluded from the Act because they never are personal chattels.

Inasmuch as growing crops are of this doubtful character, it becomes necessary to examine the provisions of the Act more closely, in order to see whether they are such goods as come within its terms, or whether they nevertheless are included within its provisions. The first section enacts that every bill of sale of "personal chattels" shall be registered, and by the interpretation clause "personal chattels" mean "goods, furniture, fixtures, and other articles capable of complete transfer by delivery." It was argued for the plaintiff that growing crops were not goods; and even if they were, they were not capable of complete transfer by delivery. It was further argued that the real meaning of that part of the interpretation clause was shewn by the subsequent part of it which defines "apparent possession." It is there enacted that the personal chattels shall be deemed to be in the apparent possession of the person giving the bill of sale so long as they remain on land or other premises occupied by him, or as they shall be used and enjoyed by him in any place whatsoever, notwithstanding that formal possession may have been taken by or given to any other person. It was argued that these words as to personal enjoyment, taken together with the expression "capable of complete transfer by delivery," shew that the Act only applies to things which, at the moment when the bill of sale is given and the provisions of the Act are to be applied to it, might be delivered to the assignee, and are not, but are left in the enjoyment of the assignor; and that it follows that, as growing crops are not capable of being used or enjoyed or

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of being delivered at the time when the provisions of the Act are said to apply to them, they are not personal chattels within its meaning. Independently of authority, I agree with that argument. There is, however, the decision of the Irish court to the contrary. That decision is entitled to the greatest respect, and if I did not feel very strongly that the true interpretation of the statute is as I have stated, I should feel bound to yield to the authority of that decision. But the decision is not a binding authority upon us; and if, on examination of the reasons given for it, we are unable to agree with them, we are entitled to form our own conclusion. Now the reasons given by the Lord Chief Justice in that case seem to me to be based upon an interpretation of the statute resting on the principle "Expressio unius alterius exclusio." It is put that, inasmuch as stock or produce which by covenant or custom ought not to be removed from the premises is excepted by the interpretation clause, it follows that growing crops, where there is no question of such a covenant or custom, must be included. But I cannot help thinking that the stock or produce so referred to means produce already severed from the land, and which might be delivered, although by the covenant or custom it ought not to be removed from the farm. If so, the antithesis is not between growing crops and such stock or produce, but between such stock or produce and similar stock or produce which may be removed.

If so, the foundation of the judgment in *Sheridan* v. *McCartney* (1) is gone, and the doctrine on which it is founded is inapplicable. For these reasons, though wishing to speak with all respect of that decision, I cannot follow it. If that judgment had been brought before the Courts of this country and approved of, we might have been bound by it; but, on the contrary, we find that in *Gough* v. *Everard* (2) the Court of Exchequer seems to have had great doubts of its correctness. The Lord Chief Baron says that it can only be supported if the Act is construed liberally and freely, but he points out that, on the contrary, having regard to the nature of the Act, it is one which ought to be construed strictly. It deals with transactions which may be perfectly bonâ

(1) 11 Ir. C. L. (N.S.) 506. (2) 2 H. & C. 1; 32 L. J. (Ex.) 210.

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fide and honest, and imposes certain restrictions upon them. An Act which, however salutary, may have the effect of taking away rights of property honestly acquired, must be construed strictly. For these reasons I think we cannot follow the decision of *Sheridan* v. *McCartney*. (1) The result is, that as to the amount of the value of the horses the plaintiff fails, but as to the amount of the value of the growing crops, the judgment must be entered for the plaintiff.

ARCHIBALD, J. I agree. With regard to the question whether these documents are bills of sale within the Act, I think that they are. It seems to me that they are documents intended to pass the property in the subject-matter of them, and so are transfers within the Act. The argument that the document is only evidence of the agreement which exists independently of the writing would go far to destroy the effect of the Act. It would be in the power of every person giving a bill of sale to make a prior verbal agreement which would pass the property, and put it afterwards into writing, and then to contend that the writing was only evidence of the contract. Assuming that the subject-matter of these documents was within the Act, I think they are bills of sale which required to be registered. The second point is whether these goods were personal chattels within the Act. I entirely agree with what my Brother Brett has said on this point. I think that growing crops may be chattels for some purposes, but even admitting this, that they are not chattels within the Act, but are expressly excluded by the terms of the 7th section. They are not capable of complete transfer by delivery within that section, because they are not capable of delivery for any useful purpose while growing. The case put by the plaintiff's counsel seems to me conclusive on that point. Suppose the sheriff seized them under an execution and sold. They must remain on the land while growing and then the sheriff might seize again under a second execution, and if the defendants' contention were correct, the objection might be made to the purchaser under the first execution that the bill of sale was not registered. We must read

(1) 11 Ir. C. L. (N.S.) 506.

the words "capable of complete transfer by delivery" with the definition of "apparent possession." Growing crops cannot be otherwise than in the apparent possession of the vendor. This seems to me clearly to shew that the Act does not apply to them. It has been urged that the words of the Act, excepting stock or produce which by covenant or custom ought not to be removed from any farm, shew that growing crops must be within the statute unless the subject of such a covenant or custom. But it seems to me that those words are satisfied by making them apply to produce severed from the land. If so, the opposite to produce mentioned in the Act is produce which is severed, and is not the subject of such a covenant or custom; and the maxim, "Expressio unius alterius exclusio," does not help the defendants' contention. With regard to the Irish decision, I desire to speak of it with great respect; but it seems to me that the attention of the judges was not called to the effect of the definition of "apparent possession." If their attention had been called to it I think they would have seen that, as growing crops must whilst growing remain upon the land of the vendor, and, therefore, cannot be otherwise than in the apparent possession of the person giving the bill of sale, they are not within the scope of the Act. The application of the statute must be limited to articles of which possession could have been given to the the vendee and which are capable of removal.

Judgment for the plaintiff.

Solicitor for plaintiff: *Mole.*
Solicitor for defendants: *Selby.*

1876
May 9.

MEYER and Others *v.* RALLI and Others.

Marine Insurance—Constructive total Loss—Judgment of foreign Tribunal—Sale of Things insured by Order of foreign Tribunal.

PD 404

The presumption with regard to the judgment of a foreign Court is that it is correct according to the law of the country to which it belongs, but when it was admitted by the parties that the law of the foreign tribunal had not been correctly declared by its judgment:—

Held, that such judgment was not binding on an English court.

The expenses which may be recovered by the assured under the suing and labouring clause in a policy of insurance free of particular average, are confined to the expenses which are necessary to avert a total loss, for which the insurer would be liable.

A sale of the subject-matter of insurance ordered by a foreign tribunal within whose jurisdiction it has been originally thrown by perils insured against, does not amount to a constructive total loss where the sale is not due to perils insured against, such perils having ceased to operate, but is made for the purpose of repaying advances incurred through the captain's breach of duty in not transhipping the subject-matter of insurance to its destination.

A cargo of rye, shipped on an Austrian ship for carriage from Enos, a Turkish port, to Schiedam, was insured by a policy warranted free of particular average. The ship meeting with stormy weather, a portion of the cargo was damaged, and the ship had to put into the port of La Rochelle. Proceedings were taken, at the instance of the captain, in the Tribunal of Commerce at that port, and, in consequence, the cargo was landed and warehoused. It was necessary to sell a portion of the cargo immediately, which was accordingly done. On the 21st of February the Court, on the petition of the captain, ordered a sale of the residue, and notice of abandonment was given to the defendants as insurers on the ground that, in the opinion of the experts or surveyors, the rye could not be forwarded to its destination. This notice the defendants refused to accept; and on the 5th of March the defendants, as insurers, summoned the captain before the Tribunal of Commerce for the purpose of having it decreed that there was no occasion to sell the residue of the rye.

The Court accordingly ordered the residue of the rye to be surveyed, and the surveyors reported that it could be re-shipped and conveyed to its destination. This report was confirmed by the Court, and notice of it given to the assured, together with notice that any course pursued with the cargo would be for their account and on their responsibility. The rye, however, was not forwarded, and remained until December warehoused at La Rochelle, although the captain might have procured a ship to carry it on. The captain having in the meantime procured advances to meet the expenses caused by the interruption of the voyage, was summoned, by the parties who had made the advances, before the Tribunal of Commerce; and on the 14th of September the Court decreed a sale of the ship, and a statement of general and particular average of the ship and cargo to be drawn up, which was accordingly done. On the 21st of December the Tribunal

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of Commerce decreed the sale of the rest of the cargo, on the ground that the weather was unfavourable for its preservation. On the 25th of January the Tribunal of Commerce decreed that the full amount of the freight due upon the whole voyage was chargeable upon the proceeds of such sale; and an amended average statement, which proceeded on this footing, was confirmed by the Court. If the proportion of freight so payable was to be added to the extra expenses incurred in respect of the residue of the cargo so sold by reason of the interruption of the voyage, including the extra freight in respect of forwarding to the port of destination, the amount would exceed the value of the rye at the port of destination. It was admitted that neither the law of France or Austria was in accordance with the decree of the 25th of January, and if the proper proportion of freight had been charged to the residue of cargo sold, the value at the port o destination would have exceeded the expenses:—

Held, that there was no constructive total loss of the cargo; inasmuch as the decree for the sale of the residue of the cargo was not due to the perils insured against, but was made for the purpose of paying advances incurred through the captain's breach of duty in not forwarding such rye to its destination; and the insurers were not concluded by the judgment of the French court from denying that there was no total loss, because it was admitted that such judgment was erroneous according to the law which it professed to administer.

SPECIAL CASE. The facts sufficently appear from the headnote and judgments.

1875. Nov. 11, 15. *Cohen, Q.C.* (*McLeod* with him), for the plaintiffs. First, it is contended that the plaintiffs are entitled to recover as for a constructive total loss. The cargo was ordered to be sold by a court of competent jurisdiction, the circumstances that brought it within such jurisdiction being perils insured against. This entitled the plaintiffs to give notice of abandonment. Unless circumstances subsequently arose under which the cargo-owner was able and could reasonably be expected to take to part of the cargo, and so, as it were, the total loss was adeemed, the plaintiffs remain entitled to recover as for a total loss. It is for the underwriters to shew that a prudent man ought reasonably to have intervened in the proceedings of the foreign tribunal. The uncertainties and heavy expenses of the litigation in this case were such as to render it the part of a prudent man not to interfere. It is contended, at any rate, that the actual sale of the residue of the cargo worked a total constructive loss. If the subject-matter of the insurance, having been brought within the jurisdiction of a competent court by perils of the seas, is actually sold by order of such court, so as to pass the property to the purchaser, that is a

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constructive total loss, and an owner cannot reasonably be expected to engage in uncertain and expensive litigation to prevent such sale. He is entitled to abandon the cargo to the underwriters, leaving them to intervene.

It is contended that the defendants' intervention in the proceedings on the 5th of March, 1866, amounted to an acceptance of the notice of abandonment, and estopped them from denying a total loss. If there was not a total loss, in what capacity did they intervene?

Secondly, the plaintiffs are entitled to recover the expenses incurred with respect to the cargo at La Rochelle under the suing and labouring clause. The expenses appear, on the facts stated in the case, to have been incurred for the purpose of preventing a total loss. If the cargo had not been unloaded and warehoused after the sea damage, the whole would have been ruined. But it is contended, that even if that were not so, the warranty against particular average does not limit the suing and labouring clause to expenses incurred to prevent a total loss. The two are quite independent clauses, and the effect is that the insurers agree to bear all expenses incurred for the protection of the cargo. If the origin of the warranty against particular average be looked to, it will be seen that the same reasoning does not apply to expenses actually incurred in protecting the thing insured as to partial damage, with respect to which it is often difficult to say whether it was really caused by sea perils or not. Public policy, and the interests of the underwriters themselves, point to this construction. The insured is not bound to take any steps, and may let the cargo become totally lost. Every inducement should be given to the captain to take all precautions for the preservation of property.

Benjamin, Q.C. (*Norman* with him), for the defendants. There was no total loss. The statements of the case distinctly shew that, according to the principle laid down in *Farnworth* v. *Hyde* (1), this was so. A substantial portion of the cargo was saved, which was worth the expense incurred, including that of transhipment to the port of destination. The only distinction in this case is the order of the Court at La Rochelle for sale of the residue of the

(1) 18 C. B. (N.S.) 835; Law Rep. 2 C. P. 204.

12 Jur. N.S. 997.

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cargo. But that sale was not necessitated by the sea perils; that part of the cargo was perfectly safe, and at the owner's disposal, and the captain ought to have forwarded it to its destination, but he applied for an order to sell it. The decision of the French court, that the full freight was due, does not conclude the defendants. It is found in the case that, according to French law and Austrian law, the residue of the cargo was not subject to payment of the full freight at La Rochelle, and consequently there was no total loss. The average statement, therefore, made by the order of the Court, was incorrect according to the law of the tribunal. This Court is, therefore, not bound by the order of the foreign Court, such order being admitted by the parties to be erroneous according to the law which the foreign tribunal had to administer.

With regard to the suing and labouring clause, only such expenses can be recovered as were necessary to avoid a total loss. The suing and labouring clause is meant to protect the interest of the insurer.

The greater part of these expenses was not incurred to protect the subject-matter of the insurance from the perils of the sea at all. The damaged portion of the cargo is sold, and a substantial portion then remains on land, in no danger whatever, and at the disposal of the owner, and for more than a year expenses are incurred in respect of it, instead of its being forwarded. How can such expenses in any case be brought within the suing and labouring clause?

Cohen, Q.C., in reply.

[The following authorities were cited during the argument: *Stringer* v. *English and Scottish Marine Insurance Co.* (1); *Cammell* v. *Sewell* (2); *Castrique* v. *Imrie* (3): *Rosetto* v. *Gurney* (4); *Farnworth* v. *Hyde* (5); *Kidston* v. *Empire Marine Insurance* (6); *Dent* v. *Smith* (7); *Messina* v. *Petrococchino.* (8)]

Cur. adv. vult.

(1) Law Rep. 4 Q. B. 676; Law Rep. 5 Q. B. 599.
(2) 3 H. & N. 617; 5 H. & N. 728; 27 L. J. (Ex.) 447; 29 L. J. (Ex.) 350.
(3) Law Rep. 4 H. L. 414.
(4) 11 C. B. 176; 20 L. J. (C.P.) 257.
(5) 18 C. B. (N.S.) 835; 34 L. J. (C.P.) 207; Law Rep. 2 C. P. 204.
(6) Law Rep. 1 C. P. 535.
(7) Law Rep. 4 Q. B. 414.
(8) Law Rep. 4 P. C. 144.

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1876. May 9. The judgment of the Court (Lord Coleridge, C.J., and Grove and Archibald, JJ.), was delivered by

ARCHIBALD, J. This is a special case, with power to draw inferences of fact. The action is on a valued policy of insurance on 18,750 kilogrammes of rye valued at 2731*l.*, including 150*l.* advance, on a voyage from Enos to Schiedam, in the Austrian ship *Unico*, warranted free of particular average unless the ship be stranded, sunk, or burnt, which was underwritten by the defendant in the sum of 2731*l.* The policy also contains the usual clause that, in case of any loss or misfortune, it shall be lawful to the assured, their factors, servants, and assigns to sue, labour, and travel for, in, and about the defence and safeguard and recovery of the said goods, merchandizes, ship, &c., or any part thereof, without prejudice to the insurance, to the charges whereof the assurers will contribute.

On the 21st of July, 1865, the defendants had entered into a charterparty with one Fattuta, of Venice, for the charter of the *Unico*, then lying at Smyrna, to proceed to Enos, a Turkish port, and there load a cargo of grain or corn, and carry it to Amsterdam or Schiedam direct, and had on the 2nd of November, 1865, shipped at Enos on board the vessel, of which Antonio Lucovich was the master, a cargo equal to 2343 English quarters, or 6800 hectolitres of rye, sound and in good order and well conditioned. The captain received at Enos 150*l.* pursuant to the terms of the charterparty. He also signed a bill of lading.

On the 8th of March, the *Unico*, then laden with the said cargo in bulk, left Enos on the voyage. On the 14th of November, 1865, the plaintiffs, through their agents, Messrs. Schroder & Bonniger, in London, purchased from the defendants for 2735*l.* 8*s.* 6*d.* the cargo in question, including freight and insurance to Schiedam as per charterparty; and on the 21st of November the defendants handed to them the policy in question.

During the months of November and December, 1865, the *Unico* on her voyage met with very tempestuous weather, in consequence of which she was obliged to jettison a portion equal to 300 hectolitres of the insured cargo; and on the 14th of January, 1866, after hoisting signals of distress, she was taken by a French fishing-smack into the port of La Rochelle, in France. On

arrival, the captain placed himself in the hands of Messrs. Admyrault & Seignette. M. Admyrault was the Austrian consul, and his firm made all necessary advances of cash to the captain.

Certain proceedings were, as stated in the special case, taken at the instance of the captain in the Tribunal of Commerce at La Rochelle, in consequence of which, first, a portion, and eventually the whole of the cargo was landed and warehoused by order of the Court. On the 10th of February, 1866, a portion of the cargo, amounting to 5552 kilogrammes, was by order of the Tribunal of Commerce sold, and realized 8537*fr.* 65*c.* On the 21st of February, 1866, on the petition of the captain, the Court ordered the sale of the residue of the cargo by public auction.

Immediately on receiving information of this order, on the 21st and 22nd of February, 1866, Messrs. Schroder & Bonniger, on behalf of the plaintiffs, gave notice of abandonment to the defendants, on the ground that, in the opinion of the experts or surveyors, the rye could not be forwarded to its destination. This notice the defendants declined to accept.

On the 5th of March, 1866, the defendants, in their capacity of shippers, vendors, and insurers of the cargo, summoned Captain Lucovich before the Tribunal of Commerce for the purpose of having it decreed that there was no occasion to sell the residue of the rye, and for the Tribunal to order a new survey. The Tribunal thereupon ordered that the sale of the rye should be provisionally suspended, and that a new inspection should be proceeded with by three surveyors, whose instructions were to say if it were possible, by continuing the expedients of manipulation and ventilation, to preserve it in its good condition, so as to enable it to be re-shipped without risk, and to be conveyed to Schiedam, its destination.

On the 14th of March the surveyors, having examined the rye, then in certain warehouses, were unanimously of opinion that the grain might be perfectly well re-shipped and conveyed without any danger to Schiedam; recommending that, if not re-shipped very speedily, it should be subject to ventilation once a month

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until the moment of its being put on board for conveyance to its destination. This report was confirmed, and ordered to be executed by the said Court, and notice of it was given to the plaintiffs on the 17th of March, 1866, together with notice that any course pursued with the cargo or any portion of it was for their account and on their responsibility.

On the 11th of May, 1866, the captain of the *Unico* applied to the Tribunal of Commerce for and obtained authority to raise, a loan on the bottomry of the ship, freight, and cargo. On the 6th of June, the captain filed a petition in the Tribunal of Commerce stating that he had been unable to effect a loan on bottomry, and asking the tribunal to declare the ship unnavigable under articles 369 and 389 of the French Code de Commerce, and a decree was made in conformity with the petition.

On the 21st of June, 1866, Messrs. Admyrault & Seignette, who had made considerable advances to meet the several expenses caused directly or indirectly by the forced interruption of the voyage, summoned Captain Lucovich before the Tribunal of Commerce to shew cause why, in default of payment to them of 20,000*fr.* within a fortnight from that date, they should not be authorized to sell for account of whom it might concern the said ship and the remainder of her cargo, the price to be paid over to them and used for the purpose of covering the advances made or to be made, and the surplus paid over to whom it might by justice be commanded; and upon the 11th of July, 1866, after service of the last-mentioned summons, Captain Lucovich issued a summons to the underwriters and the then unknown holder of the bill of lading of the cargo, in order to their becoming parties to the suit commenced by the summons of the 21st of June, and submitting such conclusions and arguments as they might think proper, and to hear it declared that the judgment to be pronounced was to be common to and binding upon all the parties.

The summons of the 21st of June came on for hearing on the 14th of September, 1866, in the absence of the defendants or any person appearing on their behalf, when the Tribunal ordered the sale of the ship *Unico*, and a statement of general and particular

average of the ship and her cargo to be drawn up, which was accordingly done.

On the 22nd of October, Messrs. Michel et fils having, on behalf of the plaintiffs, made a claim for the payment of 3780*fr.* for the advance freight paid to Captain Lucovich, and the captain inferring from this that the plaintiffs were the holders of the bill of lading for the cargo, then served upon them a notice of the judgment of the 14th of September, 1866, and a summons to attend on all subsequent proceedings.

The plaintiffs had not, prior to the 23rd of October, informed the master of the *Unico* that they were the holders of the bill of lading, and had not been summoned to attend any of the proceedings before the Tribunal of Commerce, and had not made themselves parties to the said proceedings.

On the 21st of December, 1866, the Tribunal of Commerce remanded to the 25th of January then next the decreeing respecting the statement of average; but, nevertheless, on several grounds, among others that the state of the weather was unfavourable to its preservation, ordered the sale of the remainder of the cargo of the *Unico*, and the purchase-money was ordered to be paid over to Messrs. Admyrault & Seignette, to cover the advances made by them, which included expenses incurred in and about the unsold portion of the rye down to the date of the decree, together with the charges required by the law,—the costs to be costs of average. This last-mentioned judgment was given in the absence of any person representing the defendants. On the 10th of January, under the said order the remainder of the cargo, 2779 61 hectolitres, was sold by public sale at La Rochelle, and realized a net sum of 27,830*fr.* 30*c.*

The total agreed freight of the cargo from Enos to Schiedam was 16,695*fr.* 95*c.* Of this, 3780*fr.* (150*l.* sterling) was, as already stated, advanced at Enos, leaving 12,915*fr.* 95*c.* unpaid.

On the 25th of January, the Tribunal of Commerce by its judgment declared that the freight for conveyance of the cargo from Enos to Schiedam was due in its entirety (including freight on the 300 hectolitres jettisoned), and that the advances to the cap-

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tain on account of freight at Enos must contribute to general average, and referred back the statement to the average-stater for the purpose of modifying the calculations therein; keeping in view, first, the said judgment, secondly, the sum realized by the sale of the rye, thirdly, the various costs in the suit. The Tribunal also said that the average-staters were at the same time to establish the net amount of the freight to be received by the captain out of the sum realized by the sale of the cargo.

The plaintiffs in this action were summoned through their agents, P. Michel & fils, to appear in these proceedings; but they made default, and the judgment of the 25th of January was rendered without any opposition. The defendants in this action were not summoned to appear or defend the proceedings of the Tribunal of Commerce otherwise than by a summons left at the bar of the procureur Impérial, according to French procedure, but not received by the defendants.

On the 24th of May, 1867, the Tribunal of Commerce confirmed, an amended statement of general and particular average which had meanwhile been made, and condemned the plaintiffs to pay the sum of 12,915*fr.* 95*c.* remaining due on account of freight, with interest from the 11th of July, 1866, to the time of payment, and ordered that the sum, being as stated in the judgment secured on the cargo, should be paid to Captain Lucovich by Messrs. Admyrault & Seignette, as consignees. The said sum, together with 1000*fr.* damages and interest thereon from the 28th of June, 1867, and together with an additional sum for costs subsequent to that date, was paid ultimately at La Rochelle to Captain Lucovich, after divers proceedings taken by him against the plaintiffs, out of the proceeds of the cargo. Such payment was made under and in pursuance of a judgment of the Civil Tribunal of La Rochelle of the First Instance, dated the 7th of August, 1867.

It is stated in paragraph 52 of the special case, that, by the law of France, the Tribunal of Commerce had jurisdiction to order the said various surveys of the ship and cargo and statements of average, and to make the said various orders, judgments, and decrees; but that it is a Court of First Instance of inferior juris-

diction, and its judgments, orders, and decrees are subject to appeal to the Imperial Court at Poitiers, which if made is usually decided in four or five weeks; and that no appeal was taken on the part of the plaintiffs.

It was admitted also in the case that the damages referred to in paragraphs 8, 11, and 13 were caused by the perils insured against. It is also found that the rye which was sold on the 10th of January, 1867, was in March, 1866, and in January, 1867, merchantable rye, and such as, if it had been carried on to Schiedam at any time between the time of its landing at La Rochelle and the time of its sale, would have fetched at Schiedam a price considerably more than the total of all the extra expenses properly incurred in respect of it and consequent upon the interruption of the voyage under the circumstances, including the extra freight of forwarding it to its destination. It is also admitted by the defendants that, if the proportion of freight payable upon the rye sold on the 10th of January under the said average statement is to be taken into account and added to the extra expenses aforesaid, the amount would be more than the rye would have fetched at Schiedam, if forwarded to its destination either in March, 1866, or January, 1867.

The questions which arise in the case are,—First, whether there was a constructive total loss of the cargo,—Secondly, if not, whether the plaintiff is entitled to recover any and what portion of the expenses under the sue and labour clause.

For the purpose of deciding these questions, it is necessary to consider the effect of the proceedings and orders of the Tribunal of Commerce of La Rochelle. But, before doing so, it may be worth while to inquire what under the circumstances was the duty of the captain. It is found in the case (paragraph 51) that, by the law of France, the master under the circumstances was not entitled to full freight upon the cargo landed there; but that by art. 296 of the Code de Commerce he was bound to hire another vessel to carry on the cargo to its destination, and, if unable to hire a vessel, was entitled to pro ratâ freight only; and that the law of Austria on this subject is the same as that of France. It is further found that it would have been prâcticable to hire another vessel to carry on the cargo to its destination. The case also

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states that the portion of the cargo that was sold by order of the Tribunal of Commerce on the 10th of January was merchantable, and would have fetched at Schiedam a price considerably more than the total of all the extra expenses properly incurred and consequent upon the interruption of the voyage, including the extra freight of forwarding to its destination.

It is quite clear, therefore, that, if the captain had done his duty, the portion of the cargo sold on the 10th of January, 1867, would have been forwarded to Schiedam, and that there would in that event have only been a partial loss, the portion of the cargo forwarded being only liable to pay so much of the freight of forwarding from La Rochelle,—*Rosetto* v. *Gurney* (1),—as exceeded the original rate of freight. The question is, what is the effect of the proceedings in the French courts, on this simple state of the case.

In the view which we take, we do not consider it material, for the purpose of dealing with the question whether or not there was a constructive total loss, to discuss the effect of the various surveys and orders of the Tribunal of Commerce of La Rochelle prior to the order of the 21st of December, 1866, by which the residue of the cargo was ordered to be sold, except in so far as the great lapse of time without any effort on the part of the captain to perform his duty bears on the case. There are portions of those orders and judgments, no doubt, which are properly judgments in rem, or in the nature of judgments in rem, and binding as against all the world, and, amongst others, as against both the plaintiffs and defendants. But, when we come to the order of the 25th of January, 1867, whereby it was declared that the freight for conveyance of the cargo to Schiedam was due from the plaintiffs to the ship-owner (or the captain as his agent) in its entirety, it cannot be regarded as in the nature of a judgment in rem (2); and, apart from the fact the defendants were no parties to that judgment, though we draw the inference of fact that the plaintiffs had such notice of it (3) that they might have appeared and defended,

(1) 11 C. B. 176.

(2) See *Cammel* v. *Sewell*, 3 H. & N. 617; 5 H. & N. 728; 27 L. J. (Ex.) 447; 29 L. J. (Ex.) 350; *Castrique* v. *Imrie*, Law Rep. 4 H. L. 414; *Stringer* v. *English and Scottish Marine Insurance Co.*, Law Rep. 4 Q. B. 676.

(3) See *Reynolds* v. *Fenton*, 3 C. B. 187.

(2 Sc. & Jur. N.S. 978; 6 Jur. N.S. 918.

there is this peculiarity in the case, which does not, so far as we are aware, seem to have occurred before, that, upon the express findings in the special case, by which both parties are bound, this part of the judgment seems to be manifestly erroneous in regard to the law of France, on which it professes to proceed.

The remark that the defendants were no parties to the judgment equally applies to the judgment of the 7th of August, 1867, of the Civil Tribunal of La Rochelle, by which the proceeds of the residue of the cargo attached in the hands of Messrs. Admyrault & Seignette was confirmed, and the entire amount of freight ordered to be paid out of it. The defendants, therefore, can hardly be bound by the declaration that the residue of the cargo which was sold on the 10th of January, 1867, should bear its entire proportion of freight to La Rochelle, in addition to the extra freight of conveying it to Schiedam, or by the order to pay it out of the proceeds of the goods. Moreover, even if the defendants could be considered as at all indirectly affected by such a judgment as binding the plaintiffs, the question is how far, considering the findings in the case, we should be bound to give effect to it as against the plaintiffs.

It is a matter of nicety how far a judgment of a competent foreign Court in rem, or between the same parties, is examinable here. The authorities on the subject are all collected in Story's Conflict of Laws, §§ 547 et seq., and in the notes to *Doe* v. *Oliver* (1), and need not be referred to in detail.

In the late case of *Schibsby* v. *Westenholz* (2), the principle on which effect is given to the judgments of foreign tribunals is stated to be, not on the ground merely of international comity, but on the ground that the judgment of a "Court of competent jurisdiction over the defendant imposes a duty or obligation to pay the sum for which judgment is given, which the Courts of this country are bound to enforce; and consequently anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action." (3) This principle is also assumed and acted on in *Goddard* v. *Gray* (4), where the majority of the Court held that the judgment was binding, notwithstanding that

(1) 2 Sm. L. C. 751, 7th edit.
(2) Law Rep. 6 Q. B. 155.
(3) Per Blackburn, J., Law Rep. 6 Q. B., at p. 159.
(4) Law Rep. 6 Q. B. 139.

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it proceeded on a mistake as to English law, which did not appear to have been knowingly or perversely acted on.

In Story's Conflict of Laws, the extent to which and the grounds on which a foreign judgment is said to be examinable or open to be impeached are thus summed up (1):—"It is easy to understand that the defendant may be able to impeach the original justice of the judgment, by shewing that the Court had no jurisdiction, or that he never had any notice of the suit, or that it was procured by fraud, or that it is irregular and bad by the law fori rei judicatæ. To such an extent the doctrine is intelligible and practicable." In *Castrique* v. *Imrie* (2), the House of Lords upheld a decree in rem of the Tribunal of Commerce of Havre, in which a decree was made in clear violation of English law, on the ground that, the foreign law being ascertained as a matter of fact in the case, the French Court, with every honest endeavour to be right, was liable, without any fault, to go wrong either from imperfect evidence produced before it, or misapprehension of its effect. But, in that case, in delivering the opinion of the majority of the judges, Blackburn, J., speaking of the judgment on matters of French law, says (3): "We must (*at least till the contrary is clearly proved*) give credit to a foreign tribunal for knowing its own law, and acting within the jurisdiction conferred on it by that law." And in the case of *Becquet* v. *M'Carthy* (4), Lord Tenterden had said before, "We ought to see very plainly that the Court has decided against the French law, before we say that their judgment is erroneous on that ground,"—implying that, if it clearly appeared, the Court would not give effect to the judgment. Here, the Court expressly professes to proceed on the ground of French law; and, although the presumption would be that the Court in delivering judgment would be taken to know its own law, still it clearly appears that that law was not followed, and we are precluded by the findings in the case from holding that the Court has rightly declared it. The contrary,—to use the words of Blackburn, J.,—clearly appears, and, either from inadvertence or some other reason, the foreign tribunal has gone manifestly wrong. It does not profess to declare what is the law of Austria. If it had,

(1) § 607.
(2) Law Rep. 4 H. L. 414.
(3) Law Rep. 4 H. L. at p. 430.
(4) 2 B. & Ad. at p. 957.

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though equally wrong, we might have been bound by *Castrique* v. *Imrie* (1) to have given effect to it: but it is a declaration of French law which is wrong.

Under these circumstances, we are of opinion that there is no rule of comity and no principle on which we are called upon to give effect to such a judgment, and that pro ratâ freight only was payable on the cargo at La Rochelle. If, then, freed from the burden of the entire freight at La Rochelle, the case finds that the portion of the rye sold on the 10th of January, 1867, would have realized at Schiedam more than enough to have covered the extra freight from La Rochelle, and in that event, had it been forwarded, there would only have been a partial and no constructive total loss. (2)

We must, however, consider the effect of the order of the 21st of December, 1866, for the sale of the residue of the goods, and whether it could under the circumstances appearing in the case constitute a total loss.

Now, although the sale may have been valid and binding, and the plaintiff may thereby have been deprived of the goods (3), still, upon the facts as found, it was a sale of a portion of goods which it was the duty of the captain to have transhipped and forwarded, for which a ship might have been hired at La Rochelle, and which, if forwarded at any time between the time of its landing at La Rochelle and the time of its sale some twelve months after, would have realized at Schiedam considerably more than the total of all the extra expenses properly incurred in respect of it and consequent on the interruption of the voyage.

Under these circumstances, it is impossible not to see that, although the ship and cargo were originally brought within the jurisdiction of the Tribunal of Commerce of La Rochelle by perils of the seas, the sale of this portion of the cargo was not really due to any of the perils insured against, which had long ceased to operate in regard to this portion of the goods, but was in fact made for the purpose of paying advances incurred through the captain's breach of duty.

(1) Law Rep. 4 H. L. 414.

(2) See *Rosetto* v. *Gurney*, 11 C. B. 176; 20 L. J. (C.P.) 257.

(3) See *Cammel* v. *Sewell*, 3 H. & N. 617; 5 H. & N. 728; 27 L. J. (Ex.) 447; 29 L. J. (Ex.) 350.

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But it was strenuously argued on behalf of the plaintiffs that the first order for sale of the entire cargo conferred on them the right to give notice of abandonment, and that nothing that occurred afterwards had varied that right. We think, however, that the proceedings in the case with respect to the last portion of the rye sold (the insurance being free of average), when taken together with the opinion we have expressed against the obligation to pay the entire freight at La Rochelle, are clearly in contradiction of that supposed right; and it becomes, therefore, unnecessary to consider a further contention of the plaintiffs, viz. that, though acceptance of the notice had been declined, still the conduct of the underwriter in intervening in the Tribunal of Commerce was evidence of such acceptance, and irrevocable.

Being, then, of opinion that there was no constructive total loss within the meaning of the policy, it remains to consider the next question,—whether the plaintiffs are entitled to recover anything and how much under the sue and labour clause.

It was argued on behalf of the defendants that, at the time the rye was unshipped, it was in no danger of total loss, and that it was unshipped solely for the purposes and benefit of the plaintiffs. But it is only necessary to look at the reports which are referred to in the special case, and which are to be taken as correctly setting forth the state of the cargo at the time, to see that it was in a state of heat and partial fermentation from sea-water, which if it had been allowed to go on would (and we feel constrained to draw this inference) in all probability have resulted in such damage as to be an actual total loss. It was necessary, then, for the preservation of some substantial part of the cargo, and in order to avert a total loss, to remove or unship the whole cargo.

It cannot be contended, since the case of *Kidston* v. *Empire Marine Assurance Co.* (1), that the warranty "free from particular average" excludes the operation of the suing and labouring clause: and that case is also an authority that the occasion upon which the expenses in this case were incurred was such as to be within it. As to the cases of *Great Indian Peninsular Co.* v. *Saunders* (2),

(1) Law Rep. 1 C. P. 535. (3) 15 C. B. (N.S.) 291; 33 L. J. (C.P.) 99.
(2) 1 B. & S. 41; 2 B. & S. 266; 30 L. J. (Q.B.) 218; 31 L. J. (Q.B.) 206.

and *Booth* v. *Gair* (3), cited to us by the defendants, we need only refer to the way in which they are distinguished by Willes, J., in his learned judgment in *Kidston* v. *Empire Marine Assurance Co.* (1)

A more difficult question is as to the amount of the expenses recoverable under this head. This depends, in our opinion, upon the amount of expense necessary to avert a total loss, for which alone the defendants were liable. That is a matter which, we think, must be reasonably treated, and not judged too strictly. The unshipping of the whole cargo was necessary, in order to its preservation and to the separation of the sound part from that which was irreparably damaged. But, once conveyed to the warehouse where the separation might take place, any subsequent care bestowed on that which could not be benefited by it sufficiently to enable it to be forwarded to its destination would have been of no use whatever to the residue, and would not in any way have contributed to its preservation. We are of opinion, therefore, that the plaintiffs will only be entitled to recover under this head the expenses of unshipping the whole and conveying it to a warehouse where the separation took place, and of the separation, and the expense of conditioning that portion of it which was sold on the 10th of January, 1867.

As the case does not afford us the means of stating the amount of the expenses thus incurred, we think it must be referred back to the arbitrator to ascertain the amount, applying the principle we have laid down, and that for the sum so found by the arbitrator the plaintiffs are entitled to our judgment.

Judgment for the plaintiffs.

Solicitor for plaintiffs: *Matthews.*

Solicitors for defendants: *Markby, Tarry, & Stewart.*

(1) Law Rep. 1 C. P. 535. 12 Jur. N.S. 665.

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May 8.

[IN THE COURT OF APPEAL.]

SOUTHWELL AND ANOTHER *v.* BOWDITCH.

Sale of Goods—Principal and Agent—Personal Liability of Broker.

1 Ex. D. 358
C P D. 453.

The defendant, a broker, signed and sent to the plaintiffs a note of a contract in the following terms:—"I have this day sold by your order and for your account to my principals five tons of . . . . anthracene . . . . W. A. Bowditch." In an action for goods sold and delivered:—

Held, reversing the judgment of the Common Pleas Division, that, in the absence of usage making the defendant personally liable, the defendant was not personally liable upon the contract.

APPEAL from a decision of the Common Pleas Division (1) in favour of the plaintiffs.

The facts are shortly stated in the above head-note, and are fully stated in the report of the case in the Court below subject to the following slight additions. The fact of the defendant being a broker was known to the plaintiffs. The defendant sent to the purchasers, Messrs. Bloth & Co., a bought note corresponding to the sold note sent to the plaintiffs. The defendant disclosed to the plaintiffs the name of the purchasers before the prompt day. An attempt was made at the trial to prove usage making the defendant personally liable, but failed.

[Facts were in evidence upon which, on the argument, it was contended, on behalf of the plaintiffs, that the plaintiffs had looked to the defendant himself as principal, and were entitled, apart from the sold-note, to treat him as principal; but it is unnecessary to state these facts, as the Court of Appeal answered the contention by pointing out that the plaintiffs' case at the trial had been based upon the written contract solely, and had been so treated by the Court below.]

Cohen, Q.C. (*A. L. Smith* and *Purvis* with him), for the defendant. A person signing a document in his own name is no doubt bound, but only to that which he signs. And it was clear upon the face of this contract that the defendant signed only as agent, agent for the plaintiffs as well as agent for the unnamed

(1) 1 C. P. D. 100.

purchasers. In *Fleet* v. *Murton* (1), there was merely appended to the defendants' signature the word "brokers," not "as brokers," in which the case substantially resembles the present, where the contract says not merely "sold by your order and for your account," but "brokerage 1%;" and there the defendants, contracting for unnamed principals, were expressly held liable only on the ground of usage. *Humfrey* v. *Dale* (2) was also decided on the ground of usage. *Sharman* v. *Brandt* (3) shews that a person cannot be both party to a contract and agent to sign it on behalf of the other party, so as to bind the latter under the Statute of Frauds, and therefore that the defendant, who was agent to sign this contract on behalf of the plaintiffs as sellers, cannot have been also a party to it as buyer. The words "sold to my principals" are not equivalent to "bought for my principals." The setting out of the particulars of the contract, upon which Denman, J., below, partly relied, as shewing that the defendant intended to bind himself as principal, was necessary, if for no other purpose, to satisfy the Statute of Frauds. [He referred to Blackburn on Sale, p. 89.]

Aspland (*Benjamin, Q.C.*, with him), for the plaintiffs. The sold-note in this case binds the defendant as himself the purchaser. An agent buying for an undisclosed principal is personally liable: *Thomson* v. *Davenport* (4), and cases cited in the notes thereto. (5) There is nothing inconsistent in the form of this contract with the defendant's liability as principal: *Humfrey* v. *Dale*. (2)

[MELLISH, L.J. How do you answer the observations of Blackburn, J., in *Fleet* v. *Murton*? (1)]

It is not necessary to say that the defendant is principal; it is sufficient to contend that he has taken upon himself the liabilities of principal. *Mollett* v. *Robinson* (6) is only an authority that an agent cannot as against his principal acquire the rights of a principal. Cases which cannot be similarly distinguished will be found to have been cases where the signature by the agent was qualified, and to be thus consistent with *Paice* v. *Walker*. (7)

(1) Law Rep. 7 Q. B. 126.
(2) 7 E. & B. 266; 26 L. J. (Q.B.) 137; E. B. & E. 1004; 27 L. J. (Q.B.) 390.
(3) Law Rep. 6 Q. B. 720.
(4) 2 Sm. L. C. (7th ed.) 364.
(5) 2 Sm. L. C. (7th ed.) 379.
(6) Law Rep. 5 C. P. 646; Law Rep. 7 C. P. 84; Law Rep. 7 H. L. 802.
(7) Law Rep. 5 Ex. 173.

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"Sold" implies "bought": per Lord Campbell, C.J., in *Humfrey* v. *Dale*. (1)

[MELLISH, L.J. But the defendant is, on the face of this contract, agent for the seller; your contention would, therefore, make him liable to both the buyer and the seller.]

If a broker chooses so to do business, there is no hardship upon him in that. The judgment of Cockburn, C.J., in *Humfrey* v. *Dale* (2), relies on the general law as to the liability of an agent for an undisclosed principal, and not merely upon the usage proved in that case; and Williams, J., says (3), "The usage, if it be necessary to resort to it." But apart from the sold-note the defendant is liable. The goods having been delivered, so that the Statute of Frauds is out of the question, there was upon the facts in evidence in this case a sufficient parol contract: *Pennell* v. *Alexander*. (4)

[MELLISH, L.J. Was there not, in that case, a difference between the price with which the agent debited the buyer and the price with which he credited the seller?]

The decision does not rest upon that ground.

[POLLOCK, B. You rested your case at the trial on the sold-note.]

[He referred also to *Cropper* v. *Cook* (5); *Gadd* v. *Houghton*. (6)]

JESSEL, M.R. This is an appeal from a decision of the Common Pleas Division, interpreting a mercantile contract. The first observation which I wish to make is that, so far as I know, there is in law no difference of construction between mercantile contracts and other instruments. The grammatical meaning is, as in other cases, the meaning to be adopted unless there be reason to the contrary. In the present case there can be no doubt that the person signing this contract intended to sign as broker. The contract says, "Sold by your order and for your account," and "to my principals." There is nothing whatever on the contract to shew that the defendant intended to act otherwise than as

(1) 7 E. & B. 266, at p. 272; 26 L. J. (Q.B.) 137, at p. 139.
(2) E. B. & E. 1004, at p. 1022; 27 L. J. (Q.B.) 390, at p. 396.
(3) E. B. & E. 1020; 27 L. J. (Q.B.) 396. C.J. on S. 195
(4) 3 E. & B. 283; 23 L. J. (Q.B.) 171.
(5) Law Rep. 3 C. P. 194.
(6) 33 L. T. (N.S.) 811.

(2 C.J. on S. 195

broker. No doubt it does not absolutely follow from the defendant's appearing on the contract to be broker that he is not liable as principal. There are two ways in which he might so be made liable: first, intention on the face of the contract making the agent liable as well as the principal; secondly, usage. But, as to usage, none was proved; and I can see nothing on the face of this contract to make the agent liable as well as the principal. There is no more vicious line of argument, if I may say so with deference to the Court below, than that which was adopted by the Court below in this case of comparing one contract with another and saying it differs very little; you arrive ultimately at identifying wholly different contracts.

All the three judges of the Court below rely upon previous decisions construing contracts. Grove, J., says: "I am free to admit that if this had not been a mercantile document, and we were construing a new form of contract in the same words, there might have been a real distinction between the words "I have sold for you" and "I have bought of you;" but the question is, what is the meaning of such a document as this is, viewed as a mercantile document . . . comparing it with other similar documents that have received a construction by the Courts and are well known among mercantile men." The Chief Justice refers to two cases, where he says "the documents, though perhaps not in identical terms with that now in question, were substantially and in every material respect similar." Denman, J., in like manner refers to previous decisions. But have there been such decisions as the judges of the Court below suppose? As to *Humfrey* v. *Dale* (1), the judgment in the Queen's Bench proceeds on usage, and makes for the present appellant; in the Exchequer Chamber the judges differed, Willes, J., holding that there was no contract to satisfy the Statute of Frauds, Martin, B., holding that usage was essential to the plaintiffs' case, and that there was no writing to satisfy the Statute of Frauds, Channell, B., also dissenting from the judgment of the majority, but giving no reasons, while the majority of the judges, who were for affirming the judgment of the Court below, thought, as the Court below had done, that the usage of trade charged the defendant. As to

(1) 7 E. & B. 266; 26 L. J. (Q.B.) 137; E. B. & E. 1004; 27 L. J. (Q.B.) 390.

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Fleet v. *Murton* (1), the judgments proceed upon usage of trade. Cockburn, C.J., says: "I quite agree with . . . *Fairlie* v. *Fenton* (2) . . . and I am of opinion that the same principle would apply where the principal is not named so long as it appears on the face of the contract that the broker is contracting, as broker, for a principal, and not for himself as principal;" and then he goes on to refer to the admissibility of usage. Blackburn, J., in a remarkably clear judgment, says: "There is no doubt at all in principle that a broker, as such, merely dealing as broker and not as purchaser, makes a contract from the very nature of things between the buyer and the seller, and he is not himself either buyer or seller," (the phrase "the very nature of things" hitting the fallacy of the Court below in this case), "and that consequently where the contract says 'Sold to A. B.,' or 'Sold to my principals,' and the broker signs himself simply as broker, he does not make himself by that either purchaser or seller of the goods." He then goes on to say that words may be added making the agent liable, and then refers to the admissibility of usage and the character in which it is admissible. Both on principle, therefore, and on authority, without referring to other cases than those to which the Court below referred in support of their decision, I think that in a case like this a broker ought not to be held liable.

KELLY, C.B. I think we are bound to construe mercantile contracts, not less than other contracts, by the words used, and according to the natural and usual meaning of those words. Otherwise we import into them stipulations never made. Is there anything in the terms of this contract to make the defendant liable? I forbear to advert to cases on usage of trade, except to remark that all such cases tend to shew the necessity of usage to make the broker liable in the absence of agreement that he should be; for the attempt to prove usage failed in the present case. In the terms of the contract itself there is, I think, nothing to make the defendant liable. The contract is perfectly clear, and is not like the contracts in such cases as *Paice* v. *Walker*. (3) The only ground on which, so far as I can find, the Court below

(1) Law Rep. 7 Q. B. 126. (2) Law Rep. 5 Ex. 169.
(3) Law Rep. 5 Ex. 173.

gave the unnatural construction to the contract, by which they held the defendant liable, was that "sold for you to my principals" was equivalent to "bought of you for my principals." But, when the matter is examined, that view is found to have no other foundation than such as it may have in the dicta of two judges in *Humfrey* v. *Dale* (1); and there the question was, what was the effect of these words, coupled with the usage proved, not what was their effect apart from usage. On the plain language of this contract I am of opinion that there was no purchase by the defendant as principal or otherwise than as agent, and therefore that the judgment of the Court below should be reversed.

MELLISH, L.J. I am of the same opinion. I entirely agree that this, being a mercantile contract, is, like any other contract, to be construed according to the natural meaning of the words. The contract says:—[He stated its terms.] Now there is, I think, a material difference between the words "sold for you to my principals" and "bought of you for my principals." The rule of law, no doubt, is that, if the principal is undisclosed, the broker saying "bought of you for my principals" is himself liable; but this contract says "sold for you to my principals," i.e. I, your broker, have made a contract for my principals, the buyers. The Court below have held, on the authority of *Humfrey* v. *Dale* (1) and *Fleet* v. *Murton* (2), that these words mean the same thing. But in those cases usage was proved; rightly looked at, the usage added a term to the contract, and the real difficulty, as pointed out in *Fleet* v. *Murton* (2) by Blackburn, J., was occasioned by the form of the declaration; the majority of the judges, however, in *Humfrey* v. *Dale* (1), in the Exchequer Chamber, got over that difficulty, and upon their decision *Fleet* v. *Murton* (2) is founded; therefore neither of those cases is an authority that these words not only may but must mean the same thing. No usage was proved in the present case, and the usage which has been proved in previous cases was in other trades and at other places.

(1) 7 E. & B. 266; 26 L. J. (Q.B.) 137; E. B. & E. 1004; 27 L. J. (Q.B.) 390.

(2) Law Rep. 7 Q. B. 126.

3 Jur. N.S. 213. 9 W.R. 191

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POLLOCK, B. I also think that the judgment of the Court below should be reversed. The real contention in all these cases has been, whether the broker has so named himself as to make himself liable as principal. He may no doubt do so, notwithstanding that he describes himself as a broker. It depends upon the form of the contract in each case. The question to be decided is very clearly explained in *Paice* v. *Walker*. (1) I will only add that the observation of Denman, J., in the Court below, that the defendant's "setting out in the document every particular of the contract entered into" shewed that he intended to make himself liable, seems to me to overlook the fact that these particulars would be as necessary between principals contracting through a broker, as between principals contracting immediately with each other.

Judgment reversed.

Solicitors for plaintiffs: *Venning, Robins, & Venning.*
Solicitor for defendant: *Anthony Carr.*

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Jan. 22.

RHODES AND ANOTHER *v.* AIREDALE DRAINAGE COMMISSIONERS.

Compensation—Lands Clauses Consolidation Act—Evidence of Damage—Award of Umpire.

To an action for the amount of the award of an umpire in respect of compensation for damage done to the plaintiffs' land by the execution of works authorized by a private Act, incorporating the Lands Clauses Consolidation Act, the defendants pleaded that the umpire had awarded compensation in respect of matters not the subject of compensation under the Act. The plaintiffs at the trial simply put in the award, and gave no other evidence of damage. The award ascertained the compensation at a lump sum, and stated the grounds of the award in the form of a special case. It had been determined previously to the trial that there was no power to state a special case, but it was agreed that, instead of calling the umpire, it should be taken that he had been examined and given in evidence the statements contained in the special case:—

Held, that the award and statements of the umpire were evidence of damage, the subject of compensation under the Act.

Per Lord Coleridge, C.J., and Archibald J. The award of compensation by an umpire or the verdict of a compensation jury is primâ facie evidence of damage,

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(1) Law Rep. 5 Ex. 173.

the subject of compensation, inasmuch as it is to be presumed, until the contrary appears, that compensation has only been given for damage within the Act under which it is claimed.

Per Amphlett, B. The award was only evidence of the existence of actual damage, and not evidence on the question whether such damage was a proper subject for compensation, but the statements of the umpire were evidence which the Court were entitled to consider, and that it sufficiently appeared from them that the damage was properly the subject of compensation.

Where a private Act, incorporating the Lands Clauses Consolidation Act, contained special clauses giving compensation for damages caused by the exercise of the powers of the Act to the proprietors of certain specified estates,

Semble, per Lord Coleridge, C.J., and Archibald, J., that such damage was not confined to damage that would have been actionable but for the Act; *semble*, per Amphlett, B., that it was.

Rev'd post 402. C. A.

DECLARATION upon the award of an umpire in an arbitration as to compensation for damage caused to the plaintiffs' land by reason of the exercise of the powers of the Airedale Drainage Act, 1861, which incorporated the provisions of the Lands Clauses Consolidation Act, 1845. The umpire awarded to the plaintiffs the sum of 110*l.*, of which the plaintiffs claimed payment. (1)

1st plea: Denying the making of the award.

2nd plea set out the award of the umpire as follows:—"If I have no power to state my award in the form of a special case for the opinion of the superior Court, of which the submission to arbitration of the matters so referred as aforesaid may be made a rule, then I award and adjudge that the claimants, as occupiers of Marley Hall Farm, have sustained damages by reason of and consequential upon the exercise by the commissioners of the powers of the Drainage Act, to the amount of 110*l.*, and are entitled to be paid compensation for the same to that amount; but if I have power to state my award in the form of a special case for the opinion of such superior Court as aforesaid, then I hereby state my award of and concerning the matters so referred as aforesaid in the form of a special case for the opinion of such superior Court, as follows, that is to say": The statements of the special case were in substance as follows:—Marley Hall Farm (the land in question) is a farm of about 150 acres adjoining the river Aire, and situate about one mile and a half below the lowest of the works executed by the commissioners under the powers of the Drainage Act, as herein-

(1) See the report of this case in the Court of Appeal, post, p. 402.

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after stated. The plaintiffs were tenants of the farm to Mr. Ferrand, and claimed compensation in respect of damages sustained from certain specified floodings of the farm, caused by floods which had occurred in the river Aire, in the years 1866, 1867, 1868, and 1869. All these floods occurred after works authorized by the Drainage Act had been executed by the commissioners. The said works may be divided into four classes:—1st. The diversion and alteration of tributaries of the said river, whereby the said tributaries were made to flow into the said river differently from what they previously did, and otherwise would have done. 2nd. The formation of several new cuts or channels for the said river at different points, whereby the course of the said river was shortened nearly a mile and three quarters. 3rd. The removal from the said river of shoals formed therein by gravel, soil, and other materials which from time to time had been brought down by tributaries of the said river, and deposited in the said river near the confluence therewith of the said tributaries; and, 4th. The removal of a weir belonging to a mill about a mile and a half above the said farm, being the lowest work in the said river executed by the commissioners under the powers of the Act. None of the works were executed upon lands or other property of the plaintiffs or their landlord. All the works had been executed before the floods in question, except one of the cuts, which was not made at the time of the first flood. Before the execution of the works, the farm was more or less liable to be flooded by flood waters coming down the river. The effect of making all the cuts was to bring down the flood waters of the river to the farm, about twenty-six minutes earlier than they would otherwise have reached that farm. The effect of making all the cuts except the last one was to bring them down about eleven minutes earlier. From the evidence before him, the umpire found that the plaintiffs, as occupiers of the farm, sustained damages on the occasions of the floods, by reason of and consequential upon the execution by the commissioners of all the said works, which were in operation at the respective times of the said floodings, to the amount of 110*l.*, and that the damages so sustained by them would have been substantially the same if the said weir had not been removed. He also found that there was no sufficient evidence before him to enable him to determine

one way or the other whether the said works, exclusive of the removal of the said shoals and weir, as aforesaid, caused the said farm, on the occasions of the said floodings, to be flooded to greater extents or for longer periods of time, or to be more damaged than it otherwise would have been. The plea concluded with an allegation that there had been no judgment of any superior Court pronounced or obtained upon the special case.

3rd plea: That the sum awarded by the umpire included damages and compensation for matters in respect of which the umpire had no jurisdiction.

4th plea: That the plaintiffs did not sustain any such damage, by reason of or in any way consequential upon the exercise of any of the powers of the Act, as entitled the plaintiffs to any compensation under its provisions or otherwise.

The 5th and 6th pleas do not require to be set out.

Issues. (1)

At the trial before Lord Coleridge, C.J., at the sittings in London after Michaelmas Term, 1874, the plaintiffs put in the award of the umpire, and it was agreed between the parties that, instead of the umpire's being called, it should be taken that he had made in the box the statements contained in the special case stated in his award. (2) The plaintiffs gave no further evidence of damage, the subject of compensation under the Drainage Act. The verdict was entered for the plaintiffs for the amount of the award, leave being reserved to the defendants to move to enter a nonsuit or verdict on the following grounds, viz. that the plaintiffs gave no evidence of any damage for which they were entitled to compensation; that the award proved in evidence was not final, or such an award as stated in the declaration; that the award given in evidence shewed on the face of it that the umpire gave compensation for matters over which he had no jurisdiction, and also that the third plea was proved. The Court was to have power to draw inferences of fact.

(1) The 2nd plea was demurred to, and it was held, on the argument of the demurrer, that the umpire had no power to state a special case. See Law Rep. 9 C. P. 508.

(2) This is the view of the effect of the agreement between the parties which is taken by the Lord Chief Justice in his judgment (see post, at p. 387), but it will be seen that the effect of it was stated to be somewhat different in the Court of Appeal (see post, at p. 403).

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The provisions of the special Act will be found sufficiently set out in the judgment.

A rule nisi had been obtained accordingly.

Dec. 3. *Manisty, Q.C., Bidder, Q.C.*, and *Cave, Q.C.*, shewed cause. The true construction of the special Act is, that additional protection was given thereby to certain specified proprietors and their tenants, and that by ss. 44, 45, compensation was intended to be given for all damage actually done without regard to whether it would have been actionable or not. Secondly, it cannot be that the plaintiff is bound to give any evidence of damage in the action. Great inconvenience and absurdity would result if it were so. The plaintiff would have to prove his case before two tribunals. The arbitrator is admitted to be the judge of the amount of the damage, if any; but it is said that the existence of any damage, the subject of compensation, is a matter to be proved in the action. The result is, that after a thorough investigation before a competent tribunal, at a great expense, the whole of the inquiry must be gone into again. What damage is the plaintiff to prove at the trial? All the damages sustained or only some? If the latter, then, if a shilling's worth of damage is proved at the trial the plaintiff can recover the whole amount of the award. The reason of the thing is, that the same tribunal which settles the quantum of damages should decide primâ facie as to the existence of any damage. It is for the defendants to show that the umpire took into consideration damage that was not the subject of compensation, and so exceeded his jurisdiction.

Thirdly, the statements of the umpire in this case do not shew that he took into consideration matters over which he had no jurisdiction. On the contrary, it is clear upon his findings that the damage would have been actionable damage if not authorized by the Act. He gave damages for the alteration of the course of the river, and the removal of the shoals. The defendants, but for the Act, would have been liable to an action for removing the shoals, unless they could shew they were entitled to do so. The onus lies on a person interfering with the bed of a river to shew that such interference is not wrongful.

[They cited *Duke of Buccleugh* v. *Metropolitan Board of Works* (1); *Reg.* v. *London and North Western Ry. Co* (2); *Reg.* v. *Lancaster and Preston Ry. Co.* (3); *Beckitt* v. *Morris* (4); *Reg.* v. *Metropolitan Commissioners of Sewers* (5); *In Bwyden and Llynvi Valley Ry. Co.* (6); *Embrey* v. *Owen* (7); *Worthington* v. *Hutton* (8); *Woods* v. *Reed* (9); *Cortis* v. *Kent Waterwork sCommissioners* (10); *Burland* v. *Local Board of Kingston-upon-Hull.* (11)]

Herschell, Q.C., and *Kenelm Digby*, for the defendants. The defendants were bound to give evidence of damage properly the subject of compensation. The declaration would be bad if it did not allege such damage, and the onus of proof must be on the party alleging. *Read* v. *Victoria Station, &c., Co.* (12) Then is the award primâ facie evidence of damage? The damage to be the subject of compensation under the Act must be damage that would have been actionable, but for the Act. The arbitrator decides as to quantum only. He must assume that the damage complained of is actionable. If so, it follows that the jurisdiction of the arbitrator must be shewn aliunde by proving a cause of action, and the award cannot itself be evidence of actionable damage. The following authorities shew that this Act only makes actionable damage the subject of compensation, for the words of the Public Health Acts and Waterworks Clauses Act, on which they were decided, are substantially similar: *Hall* v. *Mayor of Bristol* (13); *New River Co.* v. *Johnson.* (14) It is a general principle that has been always applied to cases of compensation, that the only subject of compensation is damage that would have been actionable.

[LORD COLERIDGE, C.J. Your contention gives no effect at all to the special clause providing for compensation in the case of the particular estate. Why should that have been inserted if it was only to give compensation already given by the general section?]

(1) Law Rep. 3 Ex. 306; 5 H. L. 418.
(2) 3 E. & B. 443; 23 L. J. (Q.B.) 185.
(3) 6 Q. B. 179.
(4) Law Rep. 1 H. L., Sc. 147.
(5) 1 E. & B. 694; 22 L. J. (Q.B.) 234.
(6) 9 C. B. (N.S.) 229; 30 L. J. (C.P.) 61.
(7) 6 Ex. 353; 20 L. J. (Ex.) 212.
(8) Law Rep. 1 Q. B. 63.
(9) 2 M. & W. 777.
(10) 7 B. & C. 314.
(11) 3 B. & S. 271; 32 L. J. (Q.B.) 17.
(12) 1 H. & C. 826; 32 L. J. (Ex.) 167.
(13) Law Rep. 2 C. P. 322.
(14) 2 E. & E. 435; 29 L. J. (M.C.) 93.

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It gives a special machinery for compensation. The award may be conclusive evidence of damage, but it can be no evidence of actionable damage, for it is admitted law that the arbitrator has no jurisdiction to inquire whether the damage, the amount of which he has to assess, is actionable or not. He has only to determine the amount and cannot decide questions of title. How can his award be evidence on a question which it was not within his jurisdiction to entertain? [They cited also on these points *Macarthy* v. *Metropolitan Board of Works* (1); *Caledonian Ry. Co.* v. *Ogilvie* (2); *Reg.* v. *Metropolitan Board of Works* (3); *Bradby* v. *Southampton Local Board* (4); *Reg.* v. *London and North Western Ry. Co.* (5); *Staffordshire Ry. Co.* v. *Hall* (6); *Chapman* v. *Monmouthshire Ry. Co.* (7)]

There is nothing on the award or in the statements of the umpire to shew actionable damage; on the contrary, they rather shew the reverse. He is unable to say if the shoals had not been removed that any damage would have been done. It is at least as consistent with what he finds, that the damage was caused by what was not wrongful, as that it was caused by what was. If the bed of a river is interfered with by deepening or widening it so as to do damage, it is actionable, but the riparian proprietor is entitled to scour it so as to restore it to its natural condition. The commissioners represent the riparian proprietors. As shoals accumulate they may be cleared away from time to time. There is nothing to shew that the removal of these shoals was wrongful. [They cited on this point *Rex* v. *Wharton* (8); *Brown* v. *Best.* (9)]

Cur. adv. vult.

Jan. 22. The following judgments were delivered:—

LORD COLERIDGE, C.J. This was an action on an award made by a distinguished lawyer (Mr. Kemplay) who was appointed umpire under the Airedale Drainage Act, a private Act passed in 1861, and with which the Lands Clauses Acts, 1845 and 1860,

(1) Law Rep. 7 H. L. 261.
(2) 2 Macq. 229.
(3) 3 B. & S. 710; 32 L. J. (Q.B.) 105.
(4) 4 E. & B. 1014; 24 L. J. (Q.B.) 234.
(5) 3 E. & B. 443; 23 L. J. (Q.B.) 185.
(6) 1 Sim. (N.S.) 373.
(7) 2 H. & N. 267; 27 L. J. (Ex.) 97.
(8) 12 Mod. 510; Holt, 499.
(9) 1 Wils. 174.

were incorporated "save so far as any of the sections and provisions of those Acts were expressly excepted or varied" by the Act itself. The 45th section of the private Act enacted that the arbitration should be conducted "in the manner provided for the settling of questions by arbitration in the Lands Clauses Consolidation Act, 1845:" and the Court of Common Pleas held, on demurrer, in this very case (1) that Mr. Kemplay was precluded from stating a special case, as he wished to do, and indeed provisionally did, to obtain the opinion of this Court on certain questions of law which arose in the course of the proceedings before him. Some of these questions are raised in a less convenient form and must be determined in our judgment upon this rule.

The action is brought upon Mr. Kemplay's award for the sum of 110*l.* and costs, which he found to be the amount of "*damages sustained* by the plaintiffs *by reason of and consequential upon* the exercise by the commissioners of the powers of the Airedale Drainage Act." It was tried before me at Guildhall, when the plaintiffs contented themselves with putting in the award of Mr. Kemplay, and then closed their case.

The defendants had pleaded,—first, in effect, denying the validity of the award under the Airedale Drainage Act; next, they had set out the award and special case, and pleaded a plea which has been held bad on demurrer; thirdly, they had pleaded that the umpire had awarded damages in respect of matters beyond his jurisdiction; fourthly, they had pleaded that the plaintiffs had not sustained any such damage as entitled them to compensation under the provisions of the Airedale Drainage Act. The fifth and sixth pleas are not necessary to be considered for the purposes of this judgment.

On this state of pleadings and proof, the defendants insisted that there was nothing to go to the jury, and that a nonsuit should have been directed: but, on my declining to nonsuit, Mr. Kemplay was called by them; and it was agreed that, without being formally examined and cross-examined, it should be taken that he had repeated in the witness-box the statements made in the special case appended by him to his award. No further evidence was given by the defendants, except that witnesses were called to

(1) Law Rep. 9 C. P. 508.

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establish the fact that the defendants had no funds in hand to meet the demand made on them by the plaintiffs: but the latter evidence becomes immaterial, as the point to which it was directed was abandoned in the argument upon this rule.

On this state of the pleadings and the proof, I directed a verdict for the plaintiffs for 2444*l.* 19*s.* 8*d.*, the amount of the damages and the costs incurred in ascertaining them; and the defendants had leave to move to enter a verdict for them.

The rule was obtained, as matter of convenience and by agreement, to enter either a nonsuit or a verdict, in the alternative; and we are now to determine whether that rule should be made absolute or discharged.

It is necessary to determine,—1, whether the evidence given by the plaintiffs, which was confined to the award, called upon the defendants for any answer,—2, whether, if it did, the statements in the special case, which are to be taken as the evidence of Mr. Kemplay, afford that answer. The solution of this latter question depends on,—3, whether the damage for which the plaintiffs are entitled to be compensated under the Airedale Drainage Act is, such damage only as without the Act would have been actionable, —and 4, whether all the damage for which it appears the umpire awarded compensation to the plaintiffs was or was not such damage.

It will tend to clearness, though it may at first sight appear illogical, if we consider the latter questions before the former one; for, if the damage giving a right to compensation under the Airedale Drainage Act be not merely actionable damage, but injury or harm, though not actionable, or if upon the whole case taken together there should be evidence that no damage except damage otherwise actionable was in fact taken into account by the umpire in ascertaining the amount of compensation, then there could be no question of nonsuit, and the verdict could not be entered for the defendants; and furthermore, the authority of the cases decided upon the Lands Clauses Acts, and on statutes containing equivalent provisions to the provisions of those Acts, would be materially weakened, because the cases would not be in point.

Now, the Airedale Drainage Act was passed, as the preamble recites, for the public object of improving the drainage and

thereby the health of a large district in the West Riding. It authorized the execution by the defendants of considerable works according to deposited plans and sections; and these works, which are enumerated in the 30th section of the Act, include "the removing from the river Aire of shoals and other obstructions:" and, after setting out a variety of works to be executed, and conferring on the commissioners a variety of powers for the purpose of executing them, the 43rd section enacts, in the first portion of it, as follows:—"In the execution of this Act, the commissioners shall do as little damage as may be, and, subject to the provisions of this Act, shall make to all parties entitled compensation for all damage or injury so done."

It has already been mentioned that the Lands Clauses Acts are incorporated with the special Act. Then follow two clauses in favour of two sets of properties, the language of which clauses is the same, except as to the properties to be affected by them. The 44th is in favour of the owners, lessees, and occupiers of the lands commonly known as the Ridlesden Hall estate and Lenton farm. The 45th section, under which the present plaintiffs claim, is as follows:—"Full compensation shall from time to time after the passing of this Act, but not beyond twenty years from and after the completion of the cuts, embankments, and works by this Act authorized, be made by the commissioners out of the rates to be levied under this Act, to the owners, lessees, and occupiers for the time being sustaining any damage by reason of or in any way consequential upon the exercise of any of the powers of this Act, of the lands and hereditaments of William Ferrand, Esq., situate in the parish of Bingley, in the West Riding of the county of York, or any part or parts thereof respectively: and, in case of dispute as to the amount of compensation, the same shall be settled by arbitration in the manner provided for the settling of questions of compensation by arbitration in the Lands Clauses Consolidation Act, 1845."

The plaintiffs are tenants of Mr. Ferrand, and claim under this section; and the question is in respect of what they have a right to claim. In respect of actionable damage only, say the defendants. The Lands Clauses Acts are incorporated; and a long series of decisions, too numerous and uniform to be now disputed,

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has settled that the damage for which compensation can be recovered, under the procedure enacted by the Act of 1845, is actionable damage only. The words of the 45th section of the Airedale Drainage Act are no wider than the words in analogous sections in the Public Health Act and the Waterworks Clauses Act; they are substantially the same; and under these last-mentioned Acts the Courts have uniformly confined the damage recoverable to actionable damage. *New River Co.* v. *Johnson* (1), decided on 10 & 11 Vict. c. 17, s. 12, the Waterworks Clauses Act, and *Hall* v. *Mayor of Bristol* (2), decided on 11 & 12 Vict. c. 63, s. 144, the Public Health Act, are no doubt authorities for this proposition. The legislature, in using the word "damage," use a word to which a legal meaning had already been affixed by judicial decisions, and must be taken to have used it in the sense ascertained by those decisions, i.e. actionable damage. Nor are the defendants driven to admit that the 44th and 45th sections do not give the persons in whose favour they are enacted any greater or better protection than they already had under the words of the 43rd: for, under the 44th and 45th sections the compensation for damage may be ascertained and awarded "from time to time" during a period of twenty years: whereas, under the 43rd, as to all other persons than those protected by the 44th and 45th sections, it can be ascertained and awarded only once for all.

These considerations are no doubt of great weight; but there are considerations on the other side of equal weight or greater. It is difficult, say the plaintiffs, to believe that the 44th and 45th sections would have been inserted in the Act in the present shape *merely* to provide that compensation under them might be ascertained and awarded more than once. Those sections appear to have been intended to give the persons in whose favour they were passed a remedy larger and wider than the Lands Clauses Act would give. They were the price paid for procuring the acquiescence of certain powerful persons in the passing of the Act; and it is to reduce the price almost to nothing to construe them as suggested by the defendants: for, the permanent *liability* to injury is a permanent injury to the property which might be taken into account on a single assessment of compensation. In the first words of the 43rd

(1) 2 E. & E. 435; 29 L. J. (M.C.) 93. (2) Law Rep. 2 C. P. 322.

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section, "the commissioners shall do as little *damage* as may be," it is plain that "damage" is used in the broad sense of harm or mischief. The interpretation of the public Acts already referred to is indeed now established; but it has been established not without resistance: and the acquiescence of the House of Lords in that interpretation has been by no means hearty or unqualified. And in such an Act as this there is good reason why compensation may have been given for damage not actionable; because the commissioners are clothed with large and varied powers to execute large and varied works, and may and probably do exercise those powers to do damage in the sense of harm or mischief which, although not actionable, it is plain no individual would be likely to do, which very few individuals could do. If, therefore, the decision of this case turned upon this point, I should have been prepared to hold that these two sections did go, in their true meaning, beyond the sections of the Acts which have been referred to and decided on, and that compensation was intended to be given by them for damage other than actionable damage.

The decision of this case, however, does not turn upon it; because I think that, construing the award by the language of the special case, no damage except actionable damage has been included by the umpire in the subject-matter of his award of compensation. For this purpose I will assume,—what we have still to discuss,—that the award is evidence, and that the statements of the umpire as to his findings are evidence also. The whole controversy as to this point between the plaintiffs and defendants turned upon the true construction of his language as to the removal of certain shoals, and upon the question what kind of removal had taken place in point of fact, and how far that removal, assuming it to have been actionable in point of law, was found by the umpire to have caused any harm in point of fact.

It is plain that, if the umpire has admitted that he considered and awarded compensation for a matter not within the Act, his award is invalid. He has awarded a lump sum; and, if part of the claims for which that lump sum has been given is bad, the whole award is bad also. *Duke of Buccleugh* v. *Metropolitan Board of Works* (1), and the case of *Dare Valley Ry. Co.* (2),

(1) Law Rep. 3 Ex. 306; in error, Law Rep. 5 H. L. 419.

(2) Law Rep. 6 Eq. 429.

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are conclusive as to this. It is important, therefore, to state with accuracy what it is that the umpire has done. He thus describes the acts of the defendants in respect to shoals:— "The removal from the river Aire of shoals formed therein by gravel, soil, and other materials which *from time to time* had been brought down by tributaries of the said river, and deposited in the said river, near the confluences therewith of the said tributaries." This is what the defendants did. Then he finds that the plaintiffs "sustained damages . . . . by reason of and consequential upon the execution by the commissioners (i.e. the defendants) of *all the said works*," including therein the removal of the shoals above mentioned. He, however, complicates the question, it must be admitted, by immediately appending the following words: "There was no sufficient evidence before me to enable me to determine either one way or the other, whether the said works, *exclusive of the removal of the said shoals* and weir as aforesaid, caused the said farm, on the occasions of the said floodings, to be flooded to greater extents, and for longer periods of time, or to be more damaged, than it otherwise would have been." The fair construction, however, of the umpire's language appears to me to be, that the removal of the shoals, with other works, and as an appreciable ingredient in the whole result, did damage (I will here say harm or mischief) to the plaintiffs. I farther think that the fair meaning of the umpire's description of the works, as to the shoals, is, that there was a dealing by the defendants with the bed of the stream beyond that mere scouring which riparian proprietors would have a right to do, supposing, which I doubt, that what a riparian proprietor might do without liability to action, could as matter of course be done by the defendants without a like liability. I understand the umpire also to describe the removal by the defendants of long-standing accumulations, of which, although some portions may have been of recent accretion, the substance must be of great though unascertained age. Damage accruing from such acts is clearly in my judgment actionable damage.

I acknowledge the authority of the cases quoted to us by the defendants' counsel, to the effect that scouring and cleansing of a river bed, so as to keep the stream in its accustomed course, and at its accustomed level, is not only permissible in but obligatory upon a riparian owner. This is the effect of the dictum of Lord

Holt in *Rex* v. *Wharton* (1), of a passage in Rolle's Abridgment, Nusans (A.), and of what is attributed to Lee, C.J., in *Brown* v. *Best* (2): and I have no intention of questioning the law there laid down. But it is equally clear that a substantial interference with the bed of a stream, so as to increase or diminish the flow of water to the detriment of other riparian owners, is a thing actionable in itself, and that damage resulting therefrom is actionable damage. It was so held by Lord Thurlow in *Robinson* v. *Lord Byron* (3), quoted in Goddard on Easements, at p. 284, and by the House of Lords in *Beckett* v. *Morris* (4), a case to which our attention was drawn with great minuteness by the plaintiffs' counsel.

The words of the Airedale Drainage Act itself appear to contemplate such a substantial dealing with the bed of the river by the defendants; and I think that, on the findings in the special case, their dealing must be taken to have been such a dealing in point of fact. I am therefore of opinion that, even on the view of the language of the 45th section of the Airedale Drainage Act, most favorable to the defendants, there has been no damage considered by the umpire in ascertaining the amount of compensation except damage that is actionable.

This, however, assumes that the award of the umpire is some evidence of the facts on which it is founded, and that the statements of the umpire as to what entered into his consideration in ascertaining the amount of damage are some evidence of the facts which he considered. Whether this is so or not is the only point which remains to be discussed. It is one point, because, if the award of the amount of compensation for damage be primâ facie evidence that the damage, in respect of which the compensation was awarded, was actionable, the findings of the umpire, which are in truth a mere explanation of his award, are primâ facie evidence of the facts necessary to or implied in the findings. And, if the award is no evidence, neither are the findings. I need not repeat (having already so far as is necessary set it out) the language of the award and of the findings.

Now, the award is part of a proceeding under an Act of Parliament in and by which the jurisdiction of the umpire is (for the

(1) 12 Mod. 510.
(2) 1 Wils. 174.
(3) 1 Bro. C. C. 584.
(4) Law Rep. 1 H. L., Sc. 47.

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purpose of this part of the discussion, I must assume) confined to awarding compensation for actionable damage. In this respect it is strictly analogous to the proceedings taken before the under-sheriff and a compensation jury, who can give compensation only for damage which is actionable. In such a case, if some of the claims made are in respect of damage which is not the subject of compensation, it was said by Lord Cranworth, in *Caledonian Railway* v. *Ogilby* (1), and no doubt with perfect accuracy, that it is the duty of the sheriff or under-sheriff to point out to the jury which kind of damage is the subject of compensation and which is not. The award is good upon the face of it: the compensation is to be presumed to be according to the claim: Russell on Arbitration, 4th ed. p. 433. As to the umpire, it is to be presumed until the contrary appears that he kept within his jurisdiction, and did not receive evidence of damage which was not the subject-matter of compensation under the Act. As to the compensation, the claim is made under the Act, and for the compensation which the Act gives; and it is to be presumed until the contrary appears that the compensation, following the claim, has only been given for damage within the Act under which it is claimed.

In most of the decided cases, the want of jurisdiction is apparent on the face of the awards set out in them. But, in the case before us, the claim is made and the compensation is awarded for damage in general terms; and it must be presumed till the contrary appears that the umpire did not make his award as to matters over which he had no jurisdiction. To hold the contrary, as we have been pressed to do, would lead to consequences of which the barest statement is very startling; and, if the argument ab inconvenienti can ever have a legitimate place in legal reasoning, it surely should have place here. In this case, an eminent lawyer has ascertained the facts of damage necessary in order to arrive at the amount of compensation, after the most careful and prolonged inquiry, on the examination of the most skilful men of science on each side, and at an expense of more than 2000*l*. It is not denied that this is not conclusive. However eminent the umpire and expensive the inquiry, it is admitted that the defendants, as they may plead so may prove that the umpire has been mistaken as to

(1) 2 Macq. 229

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the extent of his jurisdiction, and that his award is invalid. What is contended for on the part of the defendants is, that the award and evidence of the umpire is not even primâ facie evidence against them, and that the plaintiffs must, apart altogether from the award, prove in an action upon it what has been variously called, a shilling's worth of actionable damage, or a cause of action. But, in such a case as this, that means, it is manifest, that they must prove their whole case over again; for, almost the whole of the evidence was directed to making out, and almost the whole of the expense was incurred in establishing, the fact of injury, rather than the amount of compensation to be paid for it: and the expense and time consumed in proving a shilling's worth might be as much as that consumed in proving 20,000*l.* worth of actionable damage.

Such a view of the law needs authority to support it. If authority could be found, I should have deferred to it, whatever my own opinion might be, and have left my judgment to be set right, if it was wrong, upon appeal. But, as far as I am aware, there is no such authority; certainly, none of the cases cited to us appear to warrant any such conclusion. There is no doubt that it has been determined that the powers of the compensation jury (and therefore of the arbitrator or umpire) are limited to determining the fact of damage and its amount, leaving the question of right to be determined, if it is disputed, in an action on the judgment or award. This was held in *Reg.* v. *London and North Western Ry. Co.* (1), in which Sir John Coleridge elaborately reviews the earlier cases both at law and in equity; especially the conflicting decisions of Lord Cottenham in *London and North Western Ry. Co.* v. *Smith* (2), and of Lord Truro in *East and West India Dock Co.* v. *Gattke.* (3) But it is nowhere suggested, either in the judgment or in the argument, that, though the finding of the jury might be impeached in the action, it was no evidence, whether impeached or not. Indeed, the proceeding in that case to bring the inquisition up and quash it would have been useless, if, unquashed, it was not even a step in proof in an action brought upon it.

The case of *Bradby* v. *Southampton Local Board* (4), seems

(1) 3 E. & B. 443; 23 L. J. (Q.B.) 185.
(2) 1 Mac. & G. 201.
(3) 3 Mac. & G. 155.
(4) 4 E. & B. 1014; 24 L. J. (Q.B.) 234.

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now, as it did at the trial, though not perhaps directly in point, yet to lean strongly against the defendants. There had been an ex parte award against the local board. The local board admitted their liability, if there had been damage, and the plaintiffs' right to the land affected: but they denied that any actionable damage had been done; and, unless it had been done, they contended that there was no dispute as to amount of compensation, and that the award was without jurisdiction. The Court held otherwise: they said the only question at issue was the fact of damage and its amount; and that the arbitrator had jurisdiction. But this must have meant that the award ascertained the fact of *actionable* damage till it was impeached, and that it cast upon the local board a primâ facie liability to pay the sum awarded.

The cases of *Read* v. *Victoria Station Co.* (1) and *Barber* v. *Nottingham Commissioners* (2) were both decided on demurrer, and establish only that you may plead against the finding of a jury or an arbitrator, which is not here disputed. In the case of *Duke of Buccleugh* v. *Metropolitan Board of Works* (3), questions of law arose; but, as far as can be gathered from the report, the award of the arbitrator, in general terms, and good upon the face of it, was taken as primâ facie evidence that damage within the meaning of the statute had been sustained. In *Beckett* v. *Midland Ry. Co.* (4), other evidence besides the award appears to have been given. In that case, however, the award merely stated that a narrowing of a road had injuriously affected the plaintiff's house, without going on to say whether the injury and depreciation was permanent or temporary. But a permanent narrowing of a roadway is damage within the statute; whereas, a temporary narrowing is not. And in this case, therefore, it would have been impossible, from the language of the award itself, for the plaintiff without supplementing the award by evidence, to prove a primâ facie right to compensation.

The last case which it is necessary to consider is, *Chapman* v. *Monmouthshire Ry. and Canal Co.* (5) This case is the only one in which,

(1) 1 H. & C. 826; 32 L. J. (Ex.) 167.

(2) 15 C. B. (N.S.) 726; 32 L. J. (C.P.) 193.

(3) Law Rep. 3 Ex. 306.

(4) Law Rep. 3 C. P. 82.

(5) 2 H. & N. 267; 27 L. J. (Ex.) 97.

as far as I know, it has ever been suggested that an award of this sort was not evidence for the jury. In this case, no doubt, the point was taken. But there is no decision upon nor even allusion to it in the judgment of the Court. At the trial of the cause at nisi prius, Mr. Justice Willes, as he expressly said, intended deliberately to disregard, and indeed to overrule, the decision of the Queen's Bench in *Reg.* v. *London and North Western Ry. Co.* (1), already referred to; and he held the finding of the jury conclusive upon title as well as upon the fact and amount of damage, and refused to receive evidence tendered to impeach it. The judgment of the Court of Exchequer is confined to this single point, and the rule was made absolute for a new trial on that short and single ground; viz. that the Court held itself bound by the case which Mr. Justice Willes had proposed to overrule. This, as I have said, is the only case, as far as I am aware, in which the point now insisted upon before us appears to have been taken. It cannot be said to have been at all favoured by the judgment of the Court. It appears to me, in the absence of authority, to be untenable; and I am aware of no authority which gives it any countenance.

On the three important points, therefore, insisted on by the defendants, I have come to a conclusion adverse to their contention,—on the construction of the 45th section of the Airedale Drainage Act (a point perhaps not necessary to be decided); on the character of the works executed by the defendants, and on the quality of the damage resulting therefrom; and, lastly, on the effect of the award and the findings of the umpire.

For these reasons, it follows that I am of opinion that this rule should be discharged.

My Brother Archibald concurs in this judgment.

AMPHLETT, B. The first question which I think it will be convenient to consider in this case is, whether the damage for which compensation can be claimed under the 45th clause of the Drainage Act is confined to what we may call actionable damage, that is to say, damage in respect of acts for which an action might have been brought if the Drainage Act had not been passed.

Now, it could not be and was not in fact denied on the part of

(1) 3 E. & B. 443; 23 L. J. (Q.B.) 185.

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the plaintiffs, that, by a long series of cases of which I need only mention *Caledonian Ry. Co.* v. *Ogilby* (1), it is perfectly settled that the right to compensation under the 68th section of the Lands Clauses Consolidation Act (2) is limited to actionable damage. It is true that the language of the 68th section of the Lands Clauses Consolidation Act, which speaks of lands being "injuriously affected," is slightly more favorable to the limited construction; but the Courts have adopted the same construction in analogous cases, where the language used was practically identical with that of the clause we are considering: *New River Co.* v. *Johnson* (3), under the Waterworks Clauses Act (10 & 11 Vict. c. 17), where the words were, "that, in the exercise of the powers conferred by the Act, the undertakers shall do *as little damage as can be*, and shall make full compensation to all parties interested for all damage sustained by them through the exercise of such powers": *Hall* v. *Mayor &c., of Bristol* (4), under the Public Health Act (11 & 12 Vict. c. 63), where the words were, "that full compensation shall be made to all persons sustaining any damage by reason of the exercise of any of the powers of this Act."

I cannot but think, under these circumstances, that it would be undesirable on light grounds to disturb this unanimity of decision upon a point constantly arising in practice, and which, with the signal exception of Lord Westbury in *Ricket* v. *Metropolitan Railway Co.* (5), has been approved of on general grounds by almost all the judges who have taken part in such decisions.

But it was argued on the part of the plaintiffs that the legislature must have used the word damage in a more extended sense in the 45th section, since otherwise that section would have given the owners and occupiers of the lands mentioned therein no further protection than they would be entitled to under the Lands Clauses Act.

I think, however, there are two answers to that argument. First,—having regard to the decision in *Rex* v. *Bristol Dock Co.* (6), and the language of Lord Cranworth and Lord St.

(1) 2 Mac. Sc. Ap. 229.
(2) 8 & 9 Vict. c. 18.
(3) 2 E. & E. 435; 29 L. J. (M.C.) 93.
(4) Law Rep. 2 C. P. 322.
(5) Law Rep. 2 H. L. 201.
(6) 12 East, 428.

6 Jur. N.S. 374.

Leonards in *Caledonian Ry. Co* v. *Ogilby* (1),—I think it would be an *arguable* question (and that is sufficient for this purpose) whether persons who have rights in respect of a public road or a public river the same in principle but different in degree from other people, could claim compensation under the Lands Clauses Act for damage either to one or the other which was authorized by Act of Parliament. Secondly,—The compensation given by the 45th clause of the Drainage Act is quite different from that given by the Lands Clauses Act. In the latter case, compensation is given once for all; whereas, in the former case, it is to be given *from time to time*,—the reason for which no doubt was that, as the only damage that could accrue to the lower lands from the improved drainage of the upper would be at flood times, it would be impossible, or at least difficult, to estimate the damage except when the floods happened.

These reasons appear to me satisfactorily to account for the introduction of the special clause, without supposing that the legislature intended to enlarge the subject-matter of compensation. Indeed, looking at the object of the Act, which was for the more effectual drainage of a large tract of country, which is expressly recited to be, as it manifestly was, for the public benefit, it is difficult to suppose that the legislature intended that the commissioners in the execution of their duties should be hampered by claims for compensation in respect of acts which the riparian proprietors had a common-law right to do with impunity; and, if the legislature had any such intention, it is strange that they should have used language which had already at that time acquired by judicial decision a more limited sense. In my judgment, therefore, the first point ought to be decided, if it should be necessary, in favour of the defendants.

Then arises the question how the amount of such actionable damage (if any) is to be ascertained.

By the terms of the Act, in case of dispute such amount is to be settled by arbitration as provided in the Lands Clauses Act; and it is now settled, after a great conflict of opinion among the judges, that the jurisdiction of the arbitrator,—or, in this case, the umpire,—is confined to settling the amount, and does not

(1) 2 Mac. Sc. Ap. 229.

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enable him to determine what is or is not actionable damage, as distinguished from damage in fact: *Reg.* v. *London and North Western Ry. Co.* (1), *Chapman* v. *Monmouthshire Ry. Co.* (2), *Bradby* v. *Southampton Local Board of Health* (3), and numerous other cases to be found in the reports, where the same point is either decided or recognized.

It follows from these decisions that, after the award, it is competent to the defendants in an action to recover the amount awarded to deny that there was any actionable damage; and, if they succeed on that issue, the award will fall to the ground. So far, I think, there is at the present day no room for controversy.

But then in the present case, since the plaintiffs produced no evidence but the award itself, the question arises whether the award, though ex concessis not conclusive, is not primâ facie evidence of actionable damage.

On the part of the defendants in this case it may be said that it would be very extraordinary to hold that the finding of the umpire, in a matter in respect of which according to the decisions he had no jurisdiction, should nevertheless have the effect of changing the onus probandi from the plaintiffs to the defendants, which might in some cases, and probably in this, be of vital importance: and the remarks of Sir J. Coleridge, at the end of his elaborate judgment in *Reg.* v. *London and North Western Ry. Co.* (4), as to the inconvenience of even a preliminary and inconclusive inquiry, when there is to be a second and conclusive trial, are well worth attending to. Those remarks, however, were made in a case where the damage was capable of being assessed on the assumption that the road alleged to be stopped was a public road, without going into the question whether that assumption was correct in point of fact or not, and do not apply in a case like this, where it was absolutely necessary for the umpire to ascertain from what acts of the defendants the damage arose; and certainly it would be a most lamentable waste of time and money to prove that matter over again in the action.

Upon the whole, I am of opinion that these conflicting views

(1) 3 E. & B. 443; 23 L. J. (Q.B.) 185.
(2) 2 H. & N. 307; 27 L. J. (Ex.) 97.
(3) 4 E. & B. 1014; 24 L. J. (Q.B.) 259.
(4) 3 E. & B. at p. 476.

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may be best reconciled by holding, as I am disposed to do, that the award ought to be taken as primâ facie evidence of the particular acts which gave rise to the damage, but not any evidence at all on the question whether such damage was actionable or not, that being, according to the decisions, altogether beyond the jurisdiction of the umpire to determine.

The only question, then, which remains is, whether the findings of the umpire in respect of those acts enable the Court to decide that the damages arising from them were all actionable; for, if they do, I think there was a case, on the mere evidence of the award when put in, which called upon the defendants for an answer.

Now, if the case had depended upon the first part of the award, before we come to what may be called the special case, I should have thought the Court could not have so decided, because it merely finds that the damages assessed arose from the exercise of the powers of the Act, some of which extended to acts which clearly might have been done by the landowners without making themselves liable to an action; and there would be nothing in the award itself to shew that damages attributable to the last-mentioned acts were excluded. I think, however, that the latter part of the award ought not to be excluded altogether from consideration, and that we may and ought to read the umpire's finding in the first part of the award by the light of the facts subsequently stated in the special case.

Now, it is there stated (paragraph 6) that there were four distinct classes of works taken into consideration by the umpire,—first, diversions of tributaries; secondly, new cuts; thirdly, removal of shoals; fourthly, removal of weir; and all these, excepting perhaps the removal of the shoals,—of which I shall say a word presently,—were clearly acts in respect of which damage would be actionable.

Probably from not having seen the evidence, or knowing the way in which the case was shaped before the umpire, I find it very difficult to ascertain the exact meaning of the subsequent findings; but I think it must be taken to be this,—"The damage I have assessed has been occasioned by the four classes of works I have mentioned. I have ascertained that the removal of the weir made no substantial difference: and I am unable to ascertain whether the works, exclusive of the shoals and weir, would or would not

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have produced damage." This amounts, in my opinion, to a finding that the damage was caused by the conjoined result of these acts, and that the proportions due to each it was impossible to ascertain: and, if that is so, the damage would be actionable, although that arising from one of those acts, if it could have been assessed separately, would not have been so.

Entertaining this view of the construction of the award, it is unnecessary to determine whether damage from the removal of the shoals alone would have been actionable. I will only say, therefore, that I think that a question of considerable difficulty, and one on which very little authority can be found in the books; and I should be reluctant to decide it without having before me all material circumstances both as to the formation and as to the removal of the shoals.

For the above reasons, I think that it sufficiently appears from the award itself that the damage assessed was actionable damage, and that consequently the rule ought to be discharged.

Rule discharged. (1)

Solicitors for plaintiffs: *Field, Roscoe, Francis, & Osbaldiston.*
Solicitors for defendants: *Phelps & Sidgwick.*

May 9.

[IN THE COURT OF APPEAL.]

RHODES AND ANOTHER *v.* THE AIREDALE DRAINAGE COMMISSIONERS.

Compensation—Lands Clauses Consolidation Act, 1845—*Power of Arbitrator to state Case—Evidence that Award is for proper Subject of Compensation—Private Act containing special compensation Clauses.*

The umpire in an arbitration under the Lands Clauses Consolidation Act, 1845, in which each party had appointed an arbitrator, made his award in the form of a special case for the opinion of a superior court:—

Held, reversing the decision of the Common Pleas, that he had the power to state a case, the appointment of an arbitrator being, by the terms of sect. 25, a submission to arbitration on the part of the party by whom the same is made, and the arbitration being, therefore, an arbitration by consent within sect. 5 of the Common Law Procedure Act, 1854.

Semble, that in an action on an award under the Lands Clauses Consolidation

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(1) See next case.

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Act, 1845, when the defendants plead that the compensation awarded is in respect of matters not the subject of compensation, the award is not evidence that the compensation awarded is in respect of matters the subject of compensation.

A private Act, incorporating the Lands Clauses Consolidation Act, 1845, contained special clauses giving compensation for "damage" caused by the exercise of the powers of the Act to the proprietors of certain specified estates:—

Held, on the construction of these clauses, that they were limited to damage which, but for the Act, would have been actionable.

Rhodes v. *Airedale Drainage Commissioners* (Law Rep. 9 C. P. 508) overruled.

THIS was an appeal from a decision of the Common Pleas Division, reported ante p. 380, and incidentally from a decision of the Court of Common Pleas, reported Law Rep. 9 C. P. 508. Ante 383

The pleadings and facts, including the award and special case, are sufficiently stated in the above-mentioned report, ante p. 380, subject to the following slight addition and alteration:—With regard to the question whether compensation under the Airedale Drainage Act was to be limited to such damage as would, but for the Act, have been actionable, words of s. 44, assisting in the construction of s. 45, will be found noticed in the judgment of Mellish, L.J. (1) With regard to the question whether the award was evidence of such damage, the agreement referred to in the report of the case below, as to the evidence of the umpire, was stated in the Court of Appeal to have been merely that the statements in the special case should be considered as evidence given before the umpire, not as evidence given by the umpire himself in Court.

Herschell, Q.C. (*Kenelm E. Digby* with him), for the defendants. The action ought to have failed: in the first place, because, contrary to the decision of the Court below at an earlier stage (2), tacitly followed in the decision under appeal, the arbitrator had power to state a special case, and there was therefore no such award as that alleged in the declaration and denied in the first plea. The Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), expressly says, by s. 25, that the appointment of an arbitrator by each party respectively "shall be deemed a submission to arbitration on the part of the party by whom the same shall be made;" this arbitration was therefore, by the effect of that section, an arbitration "by consent" within sect. 5 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), giving power to an "arbitrator

(1) Post, p. 409. (2) Law Rep. 9 C. P. 508.

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upon any compulsory reference under" that "Act, or upon any reference by consent of parties," where the submission may be made a rule of Court, as under sect. 36 of the Lands Clauses Act it may, to state his award in the form of a special case. That is clearly in accordance with the spirit of s. 5 of the Common Law Procedure Act, 1854, the spirit of which evidently is to include all references; and the words of s. 25 of the Lands Clauses Act bring it within the letter, notwithstanding that the person claiming compensation has, under s. 23, the right to have the matter settled by arbitration without the consent of the promoters to its being so settled. The arbitration in the present case being upon the appointment of an arbitrator by each party, and not under the provision for appointment by one party singly, in default of the other, no objection arises on the ground that the section makes the appointment of an arbitrator a submission to arbitration only "on the part of the party by whom the same shall be made." There is an obiter dictum in *In re Newbold and Metropolitan Ry. Co.* (1) that a Lands Clauses arbitrator has no power to state a special case; but in *In re Dare Valley Ry. Co.* (2) the Lords Justices affirmed a decision of James, V.C., that such an arbitrator has the power; a point not noticed in the head-note to the report, and for which, consequently, the decision is not cited in the text books. The decision now in question (3) was pronounced in ignorance of the *Dare Valley Case.* (2) In *Ex parte Harper* (4) Jessel, M.R., held, without having his attention called to the authorities for or against his view, that an arbitration under the Lands Clauses Act is an arbitration "by consent" within the Common Law Procedure Act, 1854, and in *In re Harper* (5) he expressed the opinion, after his attention had been called to *Newbold's Case* (1) and the decision now in question (3), but not to the *Dare Valley Case* (2), that he had taken the right view.

In the next place, the action should have failed for want of actionable damage to support the award. The award was no evidence of damage sufficient to support it, and entitle the plaintiffs to a verdict notwithstanding the fourth plea. And it appears

(1) 14 C. B. (N.S.) 405.
(2) Law Rep. 4 Ch. 554.
(3) Law Rep. 9 C. P. 508
(4) Law Rep. 18 Eq. 539.
(5) Law Rep. 20 Eq. 39.

that the award was based upon damage not sufficient to support it. The Airedale Drainage Act (24 & 25 Vict. c. clx.), in giving compensation for damage done in the exercise of the powers of the Act, must, according to a series of decisions upon similar enactments, be taken to mean damage which would, but for the Act, be actionable. The purpose of s. 45, under which the plaintiffs claim, is merely to extend the right to compensation given by s. 43, so as to give compensation from time to time, not to extend it beyond such damage as would, apart from the Act, be actionable. The Court below misconstrued the award. The arbitrator has not found an interference with the natural bed of the river, which would, no doubt, have been unlawful apart from the Act, but only a removal of shoals; and the mere removal of shoals by a riparian owner is perfectly lawful. [He intimated his willingness that, although his first point, as to the power of the arbitrator to state a case, should be decided in his favour, the merits should, on terms as to costs, be decided on.]

Manisty, Q.C., and *Cave, Q.C.* (*Bidder, Q.C.*, with them), for the plaintiffs. The case of *In re Dare Valley Ry. Co.* (1) is no doubt a strong authority that the arbitrator had power to state a special case. As to the other points, if actionable damage is alone the subject of compensation, the award is primâ facie evidence of such damage as is necessary to support the award. Defendants sued upon an award can call the arbitrator as a witness, and shew in that way that he has awarded upon matters beyond his jurisdiction.

[JESSEL, M.R. The plaintiff must himself shew, when the question is raised, that the arbitrator had jurisdiction.]

Even if the award itself be not, as the plaintiffs contend, primâ facie evidence of such damage as is necessary to support the award, the statements in the special case shew that there was actionable damage, and that the arbitrator has awarded for that alone. The only substantial question, no doubt, is as to the removal of shoals, since the arbitrator has excluded, except to the amount of 40s., all damage otherwise caused; but by the removal of shoals he meant shoals which had become part of the bed of the river; and a riparian owner may not interfere with the

(1) Law Rep. 4 Ch. 554.

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bed of the river. Further, actionable damage was not necessary. The Airedale Drainage Act is wider than the Lands Clauses Act, and extends to damage which, even apart from the Act, would not be actionable.

[MELLISH, L.J. If that had been the intention, would not the Act, passed, as it was, after decisions limiting the right to compensation under the Lands Clauses Act to actionable damage, have contained a special clause ?]

The general clause, s. 43, no doubt covers only actionable damage ; but s. 45, relating to the tenants of the plaintiffs' landlord, is wider.

JESSEL, M.R. This is an appeal from the Common Pleas Division, involving not only the decision immediately appealed from, but also virtually a decision of the Court of Common Pleas on demurrer some time ago. We have determined to decide the question which was raised by the demurrer as if it were now formally before us upon appeal from that earlier decision. That is the more desirable because, as I have said, we must incidentally decide it. The question on demurrer was whether an arbitrator under the Lands Clauses Consolidation Act, 1845, had power to state a special case. The Court of Common Pleas held that he had not. No doubt, under the words of the Common Law Procedure Act, 1854, s. 5, by which, if at all, the power is given, there is some difficulty, as it refers apparently only to arbitrations by direction of a Court or judge or by consent. But, on the other hand, it would be strange if all statutory references were excluded. If it is possible to bring such an arbitration as the present within the purview of the enactment, we ought, I think, to do so. I do not think it necessary to repeat with reference to this matter the reasons which I gave in *Harper's Case*. (1) The Court of Common Pleas, in deciding this point, did not know of the *Dare Valley Case* (2), where the Court of Appeal in Chancery affirmed the decision of James, V.C., that an arbitration under the Lands Clauses Consolidation Act, 1845, was within the provisions of the Common Law Procedure Act, 1854, s. 5, as to arbitrations by consent, a case of which I also did not know when *Harper's Case* (1)

(1) Law Rep. 18 Eq. 539 ; Law Rep. 20 Eq. 39. (2) Law Rep. 4 Ch. 554.

was before me. It would of course have bound them. Having regard to that case we must, if we are to follow authority, hold that the arbitrator had power to state a special case. At the same time, I am far from saying that we must in every instance follow the decision of a co-ordinate court. There must, however, be strong reasons for disregarding it, and there are no such reasons in the present instance. The next question is, whether damage which would, save for the special Act, be actionable, is alone the subject of compensation under the special Act; and upon that, having regard to previous decisions, and not overlooking the fact that clauses 44 and 45 are landowners' clauses—a fact to which the Court below gave effect in favour of the plaintiffs, but upon which the remark arises that landowners would naturally have taken care to make the intention of clauses in their own favour clear—I am of opinion that damage which would, but for the Act, be actionable is alone the subject of compensation under the Act. Then is there any such damage? No dispute arises as to the law. The law is well settled that riparian proprietors are entitled to remove casual obstructions, i.e., what one may call casual obstructions rather than the natural bed of the river. The only dispute is as to the construction of the award, and upon that I differ from the Court below, and come to the conclusion that that for which the arbitrator intended to award compensation was the removal of shoals which were merely casual obstructions; and, inasmuch as a riparian proprietor not only may but must remove such shoals, the award is for damage which would not, apart from the Act, have been actionable. As to costs, the costs in the Court below and in this Court will of course follow the usual rule, but as to the demurrer we think there ought to be no costs.

KELLY, C.B. The case comes before us in rather a complicated form. The action is upon an award under the Lands Clauses Consolidation Act, 1845. A verdict was entered for the plaintiffs for 110*l.*, the amount of the award, subject to leave to the defendants to move to enter a non-suit or verdict for them. The question thereupon is, whether the award is good. That throws us back on the arbitrator's power to state a special case, and that again throws us back on the decision of the Court of Common

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Pleas upon the demurrer to the second plea. No appeal has been brought against that decision, but, availing ourselves of the power which we possess under the Judicature Acts, we think we ought to consider it. The question then turns upon s. 5 of the Common Law Procedure Act, 1854. Looking at the matter apart from the decisions, this arbitration seems to me to be, by the effect of s. 25 of the Lands Clauses Consolidation Act, 1845, an arbitration by consent, the claimants and the commissioners having each appointed an arbitrator, instead of the commissioners having exposed themselves to an appointment by the claimant singly, and the appointment of an arbitrator being, by the terms of s. 25, a submission to arbitration on the part of the party by whom the same is made. I should say, therefore, apart from the decisions, that the arbitration was within s. 5 of the Common Law Procedure Act, 1854, and this view is confirmed by *In re Dare Valley Ry. Co.* (1) That disposes of the first decision in this case, and at the same time, in strictness, would dispose of the appeal altogether. We think, however, that to avoid future litigation we ought ourselves to decide upon the special case. Are, then, the plaintiffs entitled to the sum of 110*l.* or any other sum? That depends upon whether the plaintiffs have "sustained damage by the exercise of the powers of the" Airedale Drainage Act. By a long series of decisions it has been held that the damage must be such as would, but for the Act, have been actionable. What then does the special case say as to the damage? The arbitrator does not say that the bed of the river was interfered with, but only that damage was caused by the removal of shoals; and the law is perfectly clear that a riparian owner may remove shoals, so long as he does not impede the navigation or diminish the flow of the river, without giving any right of action to persons in the position of the plaintiffs. The plaintiffs, therefore, are not entitled to the compensation awarded.

MELLISH, L.J. I am of the same opinion. As to the first point, viz. whether an arbitrator under the Lands Clauses Consolidation Act, 1845, can state a case for the opinion of a superior court, I should, if there had been no decisions on the subject, have had

(1) Law Rep. 4 Ch. 554.

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considerable doubt, though I think I should, even in those circumstances, have agreed with the Master of the Rolls; but, having regard to the state of the authorities, I do not think it necessary to go into the question. The matter came first for decision before the present Lord Justice James, when Vice-Chancellor; his decision was affirmed by the Lords Justices, and certainly that decision is not so wrong that we, as a co-ordinate Court, could take upon ourselves to overrule it. The arbitrator having, therefore, had power to state a case, I agree with Mr. Herschell that the verdict ought to have been for the defendants on the plea of no such award. But Mr. Herschell and Mr. Manisty both thought with us that it would be well we should go on to consider the merits, Mr. Herschell stipulating only that this should be upon terms as to costs. The first question which arises thereupon is whether s. 45 (1) of the Airedale Drainage Act (24 & 25 Vict. c. clx.) goes beyond damage which, apart from the Act, would be actionable. On all the authorities I think that compensation is given only for damage which, apart from the Act, would be actionable. The argument for the plaintiffs was based upon the difference of s. 45 from s. 43. I was, therefore, curious to see what was said by s. 44. I find that that is a clause relating to Riddlesdown landowners, and in the main agreeing with s. 45, but containing the words "whether the lands injuriously affected be within or without" a certain area, the words "injuriously affected" being the very words which in s. 68 of the Lands Clauses Act have been considered decisive of the question whether damage without legal injury can be the subject of compensation. Those words were only omitted from s. 45 because Mr. Ferrand's land, with the owner and tenants of which the section deals, is all without the area in question. I think it perfectly clear, therefore, that the plaintiffs are only entitled to compensation for damage which, apart from the Act, would have been actionable. Then, upon the right construction of the award, is it for such damage? With deference to the Court below, I entertain no doubt that it is not. Shoals may, no doubt, by degrees become part of the bed of a river; but so long as they are shoals they clearly may be removed; and the case speaks of shoals formed by "gravel, soil, and other materials which from time to time had

Ante 403.

(1) Sect. 45 is set out, ante, p. 389.

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been brought down," i.e., primâ facie, mere shoals. As to the other two sets of work, the arbitrator does not find damage from either of them. He, therefore, has not found damage in respect of any matter over which he had power.

POLLOCK, B. I am of the same opinion. As to the first point, I should, if the matter had been res nova, have had considerable doubt; but there is the decision of the Lords Justices in *In re Dare Valley Ry. Co.* (1), and convenience, as shewn by the case of *Duke of Buccleuch* v. *Metropolitan Board of Works* (2), is on the side of that decision. As to the other points, I agree that damage which, but for the Act, would have been actionable is alone the subject of compensation under the Airedale Drainage Act, and that the award, if rightly construed, means that the damage caused was caused by the removal of shoals, and that is clearly not such damage.

Judgment reversed.

Solicitors for plaintiffs: *Field, Roscoe, & Co., for Jeffery, Taylor, & Little, Bradford.*

Solicitors for defendants: *Phelps & Sidgwick, for Brown, Skipton.*

Feb. 12.

ALDRIDGE, APPELLANT; HURST, RESPONDENT.

Parliament—Borough Election—Amendment of Petition by striking out Claim for Seat.

This Court will not amend an election petition by striking out, after the lapse of the time limited by the Act for presenting it, that part of the prayer of the petition which claims the seat for the petitioner (an unsuccessful candidate) and the allegations applying to a scrutiny which would be dependent thereon, inasmuch as this would affect the rights of the constituency.

Practice of election committees in this respect followed.

Semble, that it is competent to this Court to amend an election petition at any time by striking out allegations therein, where it is satisfied that no injurious result, or a beneficial one, will follow; or by adding matters discovered after the filing of the petition.

THIS was a petition against the return of Mr. Hurst at the last

(1) Law Rep. 4 Ch. 554.

(2) Law Rep. 3 Ex. 306; Law Rep. 5 Ex. 221; Law Rep. 5 H. L. 418.

election for the borough of Horsham. The petition, as presented, was as follows:—

1. Your petitioner was a candidate at the above election.

2. Your petitioner states that the said election was holden on the 17th of December, 1875, when R. H. Hurst, Esq., T. Richardson, and your petitioner were candidates; and the returning officer has returned the said R. H. Hurst as being duly elected.

3. Your petitioner further says that the said R. H. Hurst was by himself, by his agents or agent, and by other persons on his behalf, guilty of bribery and undue influence before, during, and after the said election, whereby he was and is incapacitated from serving in parliament for the said borough of Horsham, and the said election and return of the said R. H. Hurst were and are wholly null and void.

4. Your petitioner further says that many persons voted at the said election and were reckoned upon the poll for the said R. H. Hurst, who were guilty of bribery, treating, or undue influence, and who were bribed, treated, or unduly influenced to vote thereat for him, and that the said votes of all such persons were null and void, and ought now to be struck off the poll.

5. Your petitioner further says that many persons who were disqualified to vote at such election by reason of their holding or having held disqualifying employments, or having been retained, hired, or employed for the purposes of the said election as agents, canvassers, clerks, messengers, and other like employments, were nevertheless admitted to vote and did vote for the said R. H. Hurst, and that such votes ought now to be struck off the poll.

6. Your petitioner further says that persons personated and voted for certain electors whose names appear on the register of the said borough, but who did not themselves vote, and that the votes so recorded ought now to be struck off the poll.

7. Your petitioner further says that the said R. H. Hurst obtained an apparent and colorable majority over your petitioner, whereas in truth and in fact your petitioner had a majority of the votes of the electors of the said borough who voted at the said election and who were at the time thereof duly qualified by law to vote, and was duly elected as a member to serve in parliament for the said borough, and ought to have been returned as such member.

Therefore, your petitioner prays that it may be determined that the said R. H. Hurst was not duly elected or returned, and that his election and return were and are wholly null and void, and that your petitioner, the said John Aldridge, was duly elected and ought to have been returned.

After the expiration of the time allowed by s. 6 of the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), for filing a petition, application was made on behalf of the petitioner, to Quain, J., at chambers, for leave to amend the petition by striking out that part of the prayer which claimed the seat for the petitioner, and certain allegations therein applying to a scrutiny which would be dependent on the claim of the seat. This application

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was supported by an affidavit stating, amongst other things, that it was made bonâ fide and without collusion. The learned judge referred the matter to the Court.

Feb. 5, 6. *A. L. Smith* accordingly moved for a rule, and *C. S. Bowen* and *Scott* shewed cause against it. The arguments urged upon either side, and the authorities and the several sections of the Act bearing upon the question cited and commented upon by the learned counsel respectively, sufficiently appear from the judgment.

THE COURT (Grove, Archibald, and Lindley, JJ.,) intimated that they were prepared to refuse the rule, but, as the matter was one of considerable importance, they would give their reasons on a later day.

Cur. adv. vult.

Feb. 12. The judgment of the Court was delivered by

GROVE, J. In this case, which was that of a petition against the return of Mr. Hurst for the borough of Horsham, an application was made to Mr. Justice Quain to amend the petition by striking out a part of its prayer, viz. that which claimed the seat for Major Aldridge, the petitioner, and certain other allegations applying to a scrutiny which would be dependent on this claim. The question was referred by the learned judge to this Court, and an affidavit by the petitioner was read, stating (amongst other things) that the application was made bonâ fide and without collusion. But, as our judgment does not turn on the terms of this affidavit, we need not go fully into this.

On the part of the petitioner, it was urged that s. 2 of the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), invests this Court, subject to the provisions of the Act, with the same powers, jurisdiction, and authority with reference to an election petition and the proceedings thereon as it would have if such petition were an ordinary cause within its jurisdiction. It was also stated that an order such as that now asked had been made by Pigott, B., though the case appears to have been scarcely argued before that learned judge. The case of *Stevens* v. *Tillett* (1) was also cited, where this

(1) Law Rep. 6 C. P. 147.

Court, after the abandonment of a claim to the seat at a trial before an election judge, and the subsequent election of the claimant, held that the petitioner against him might give evidence of corrupt practices by himself and his agents at the previous election, although they might have been given in evidence in support of recriminatory charges at the previous trial, where the now sitting member was petitioner.

It was further contended that, although the Court might not have jurisdiction to add new matter to a petition, it might expunge on proper grounds shewn.

It was contended contrâ, that, without going the length of saying that the Court or a judge might not have jurisdiction to allow the addition or withdrawal of certain allegations in an election petition, it could not permit the withdrawal of a distinct prayer, such as that claiming the seat; that this would be analogous to if not within the sections of the Act and the rules relating to the withdrawal of an election petition; that such withdrawal, if permissible at all, should be guarded by similar provisions, and not allowed by the Court upon mere application and affidavits; and that the respondent ought not to have his right to adduce recriminatory evidence taken from him by such an application as this. We were of opinion that the arguments for the respondent were well founded, and that the application should be refused; and, as the matter pressed, we announced our decision to that effect, and we now proceed to state the main grounds on which it proceeded.

It will be observed that the 2nd section of the Act above alluded to states that the powers there given shall be subject to the provisions of the Act; and we think it clear that the jurisdiction conferred by the Act cannot be in all respects the same as that of the Court in ordinary causes. Numerous provisions of the Act have reference not merely to the individual interests or rights of petitioners or respondents, but to rights of electors, of constituencies, and of the public, in purity of election and in having the member seated who is duly returned by a majority of proper votes. It appears to us also that the scope of the Act is, that petitions should not be mere pleadings, nor framed for the purpose of intimidating or in any way inducing the respondent to

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abandon his seat; still less, of course, should they be collusive; but that they should be real, well considered, and not lightly withdrawn either in whole or in part: see ss. 5, 6, 8, s. 11, subss. 14, 15, 16, and ss. 20, 35 to 48, and other parts of the Act.

By s. 5 of the Act, a petition may be presented by a person who voted or had a right to vote at the election, or by a person claiming to have a right to be returned or elected. By subs. 13 of s. 11, the judge is to determine not merely whether the member whose return or election is complained of, but whether any or what other person was duly returned or elected; and s. 53 speaks of a petition complaining of an undue return and claiming the seat for some person. These sections shew that not merely may the candidate who is not returned claim the seat, or, in other words, claim to have been duly elected, but that any other voter might claim the seat for a candidate who has not been returned; and claims have been so made, as in *Stevens* v. *Tillett* (1) and other cases.

This right of petitioning shews that the Act contemplates, in regard to petitions, not merely the rights of candidates not returned, but the rights of the constituency to insure that the person really elected should be their member; and this without the cost and disturbance of a new election, as the judge's decision in favour of such claim is final: *Taunton Case.* (2)

It appears to us that it would be an infringement of this right, if, a petition having been presented by one person (in this case a candidate) claiming the seat, the claim to the seat could be withdrawn by the mere motion of the person presenting it, after the twenty-one days, when no other petition could be presented, and thus the voters be prevented from claiming the seat for one who may be the duly-elected representative; or, on the other hand, from shewing by means of the recriminative charges which put in issue the claim, that the claimant is not a person entitled to the seat by that election, or that he is disqualified for future elections; such withdrawal not being accompanied by the power to substitute another person as petitioner, by means of which the inquiry might be gone into at the trial. A right to have an election petition proceeded with though one object of it is attained, is recognised by s. 18 of the statute, which provides that an election petition

(1) Law Rep. 6 C. P. 147. (2) Law Rep. 4 C. P. 361.

shall be proceeded with, notwithstanding the acceptance by the respondent of an office of profit under the Crown.

It appears to us that the withdrawal of this portion of the prayer of the petition is in pari materiâ with, even if it is not within, the provisions of the Act relative to the withdrawal of a whole petition. We see no reason why the prayer claiming the seat for some one might not form the subject of a separate petition from that which is directed against the return of the sitting member; and, if so, it would be within the provisions of s. 35 and the rules 45 et seq. carrying out those provisions, which provide inter alia for due notices to be given to the constituency and for the substitution by leave of the judge of another person in place of the petitioner. If this be so, and these sections and rules apply to a petition simply claiming the seat for some person, we see no reason why they should not apply to such claim when the prayer involving it is joined with another or other prayers; and if, in the latter case, by reason of the words "in whole or in part" not occurring in the provisions of the Act as to withdrawal of petitions, applications such as the present do not fall within such provisions, we see no reason why, at all events, the election judges may not, under s. 25, make rules for properly guarding the interests of the particular constituencies and of the public in respect of such applications. We, however, incline to think, although it is not necessary to decide this point in the present case, that "*an* election petition under the Act," s. 35, is not the less *an* election petition because it is joined in one document with another petition; and, if so, the provisions as to withdrawal apply to the present case.

By s. 22, two candidates may be made respondents to the same petition; and this case may for the sake of convenience be tried at the same time, but "for all the purposes of this Act such petition shall be deemed to be a separate petition against each respondent." This section shews that two petitions may be joined in one document and tried at one time. By s. 26 it is provided that, "so far as rules framed under s. 25 do not extend, the principles, practice, and rules on which committees of the House of Commons have heretofore acted in dealing with election petitions shall be observed, so far as may be, by the Court and judge in the case of election petitions under this Act."

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It therefore becomes desirable to see what has been the mode in which election committees have dealt with cases analogous to the present.

In the *Clare Case* (1) recriminatory evidence was allowed to be given against a candidate for whom the seat was claimed, though the claim to the seat was abandoned. So also in the *Coventry Case* (2) and other cases cited in Rogers on Elections, ed. 1863, p. 470. The *New Windsor Case* (3), cited in the present case by the learned counsel for the petitioner, does not appear to conflict with the other decisions, as the committee there allowed recriminatory evidence to be given against a petitioner who had abandoned his seat. The *Malden Case* (4) was also relied on for the petitioner. In that case there were three petitions. The second petitioner, who charged bribery and treating against the sitting members, and claimed the seat for himself, *wholly* withdrew his petition; and what the committee decided was, to decline to proceed upon the application of a third petitioner who alleged corrupt practices against the second petitioner, the committee having unseated the sitting member on the first petition. This decision does not appear to us substantially to conflict with the other decisions of election committees, as tribunals of this description must have some discretion as to where inquiries are to stop.

The practice of committees of the House of Commons appears to us therefore to be strongly in favour of not excluding recriminatory evidence by the sitting member where the seat is claimed by the petitioner, and the petitioner afterwards desires to abandon the claim; and the exclusion of such evidence appears to be the only object sought by this application, as, if it were not desired to exclude this, or it were known that no recriminatory evidence would be adduced, the alleged object as to saving cost could be attained by giving the respondent notice that no evidence would be tendered in support of the claim to the seat, and that that claim would not be persisted in at the trial.

The learned counsel for the petitioner fairly adduced the fact that frequently, if not universally, election petitions were presented on the last of the twenty-one days; and, if so, information was not

(1) Wolf. & B. 143.
(2) 1 Peck. 99.
(3) 2 Peck. 187.
(4) 2 P. R. & D. 143.

given by them of which members of the constituency could avail themselves by presenting in due time another petition, if they found the requisite allegations and prayer in the petition presented were unsatisfactory to them. This may present a difficulty in remedying a defect if a prayer such as this joined with another prayer in one document be not within the clauses and rules as to withdrawal; but we do not see that it affords an independent argument in favour of granting this application; and it is a difficulty which may probably be lessened or removed by rules under s. 25.

It is also to be observed that, although petitions may be presented at the last moment, it is commonly known in the county or borough that such petitions are likely to be presented; and, if any suspicion exists that they are sham petitions, means are taken by those who are in earnest to lodge petitions; and the entire withdrawal of collusive petitions is guarded against by the provisions of the Act to which we have alluded.

In one point of view it is an argument against our allowing this prayer to be withdrawn, that, if there be no power under the withdrawal clauses to substitute a person for the petitioner as to this prayer, the constituency will be without means of proving either that the petitioner is the duly-elected member, or to answer his allegation that he is elected, or to shew that he is unfit to serve in a future parliament, he himself having raised this issue by claiming the seat.

We by no means decide that this Court has no power to make amendments in petitions, provided it sees that no injurious or unjust result or that a beneficial result will follow. In *Pickering* v. *Startin* (1), the Court of Common Pleas allowed, in the case of a municipal election petition, an amendment by adding two paragraphs relating to matters discovered after the filing of the petition. On the other hand, in *Maude* v. *Lowley* (2), an application for an amendment by addition of allegations as to acts committed in other wards besides those named in the original petition was refused by this Court.

We do not enter into the arguments as to the question of the position of the sureties being altered, as the counsel for the peti-

(1) 28 L. T. (N.S.) 111. (2) Law Rep. 9 C. P. 165.

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tioner agreed to make their consent to this amendment a condition on his leave to amend.

We cannot discard the question of possible collusion in favour of particular individuals: the provisions giving protection against the chance of this must be of general application, and its possibility jealously watched by judges and the Court.

Here, if the petitioner suffers in the result, he has brought it on himself; but if, as he states in his affidavit, he has no cause for apprehension, he can hardly suffer any damage, as, if he give notice to the other side of not pressing his claim, and if, in consequence of particulars furnished by the respondent, he has to go to expense in defending the conduct of himself or his agents, and he does this successfully, the election judge will probably decide in his favour as to the costs of such defence. If otherwise, he can hardly complain of having to pay them. That this matter may be entirely open for the discretion of the learned judge at the trial, we, in refusing this application, leave the costs of it to be adjudicated upon by the judge who tries the case.

Rule refused.

Agents for petitioner: *Robinson & Preston.*
Agents for respondent: *Wyatt, Hoskins, & Hooker.*

May 1.

[IN THE COURT OF APPEAL.]

HAWES *v.* PAVELEY.

Prohibition—Lord Mayor's Court—Demand under 50*l.*—*Defendant carrying on Business within Jurisdiction—Mayor's Court Procedure Act*, 1857 (20 & 21 *Vict. c. clvii.*), *ss.* 12, 15.

The effect of the 12th and 15th sections of the Mayor's Court Procedure Act, 1857, is to extend the jurisdiction of the Mayor's Court in cases within the 12th section, and consequently a prohibition cannot be granted to prohibit an action in the Mayor's Court for a sum of less than 50*l.*, the defendant carrying on business, and part of the cause of action having arisen, within the city.

Mayor of London v. *Cox* (Law Rep. 2 H. L. 239) distinguished.

APPEAL from the decision of the Common Pleas, making absolute a rule for a prohibition which had been obtained to prevent fur-

ther proceedings in an action in the Mayor's Court by the plaintiff. The action was upon a bill of exchange for 45*l.* 2*s.* 2*d.*, which had been drawn and accepted by the defendant out of the jurisdiction of the Mayor's Court, but accepted payable within the city of London.

The bill had been duly presented for payment in the city, and dishonoured. Consequently the claim was under 50*l.*, and a part of the cause of action arose within the jurisdiction of the Mayor's Court. The defendant carried on business within the city of London. (1)

Edwyn Jones, for the plaintiff, cited *Manning* v. *Farquharson* (2), *Baker* v. *Clark*. (3)

Alexander, for the defendant, cited *Wallace* v. *Allen* (4); *Gold* v. *Turner* (5); *Quartly* v. *Timmins* (6); *Mayor of London* v. *Cox* (7); *Jacobs* v. *Brett*. (8)

JESSEL, M.R. I am of opinion that the judgment must be reversed. This is a question of importance with regard to the jurisdiction of the Mayor's Court. The construction of the Act upon which the question depends ought to be one which imputes to the legislature a reasonable intention in passing the Act, and not one which will create an absurdity. The title of the Act states that the Act is one for (inter alia) extending the jurisdiction of the Lord Mayor's Court. The 12th section is that upon which the decision of the case rests. It is clear that in the present case

(1) The Mayor's Court Procedure Act, 1857, 20 & 21 Vict. c. clvii., s. 12, enacts, "that where the debt or damage claimed in any action shall not exceed the sum of 50*l.*, no plea to the jurisdiction shall be allowed, provided the defendant, or one of the defendants, shall dwell or carry on business within the city of London, or the liberties thereof, at the time of action brought, or provided the defendant, or one of the defendants, shall have dwelt or carried on business at some time within six months next before the time of the action brought, or if the cause of action either wholly or in part arose therein." The 15th section enacts that "no defendant shall be permitted to object to the jurisdiction of the Court in or by any proceeding whatever, except by plea."

(2) 30 L. J. (Q.B.) 22.

(3) Law Rep. 8 C. P. 121.

(4) Law Rep. 10 C. P. 607.

(5) Law Rep. 10 C. P. 149.

(6) Law Rep. 9 C. P. 416.

(7) Law Rep. 2 H. L. 239.

(8) Law Rep. 20 Eq. 1.

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the effect of that section is that the defendant could not plead to the jurisdiction. The effect of the 15th section I have already held, after very careful consideration, to be that the defendant must, if he object in the Mayor's Court to the jurisdiction, do it by way of plea, and not in any other way. The section takes away the right of objecting in the Mayor's Court itself by any other method. The result of the two sections together would be, if the defendant's contention is correct, that though the defendant cannot in any way inform the Mayor's Court of the want of jurisdiction, and that court therefore cannot be told that it is going wrong, a stranger may get a prohibition to the Court. This is, in my opinion, to impute an absurd intention to the legislature. The true construction of the two sections taken together appears to me to be that in cases within the 12th section the jurisdiction of the Court is extended. The mode of expressing it is, that the defendant shall not be permitted to object by way of plea in the court itself. And as the only way by which he can object in the court itself is by way of plea, the consequence is that the Court cannot be informed of any want of jurisdiction in cases within the 12th section, and the only reasonable inference is that it is intended also to prevent the objection from being raised in any other form elsewhere. The Lord Chief Justice, who heard the greater part of the argument, has asked me to state that he agrees with the conclusion at which I have arrived. (1)

MELLISH, L.J. I am of the same opinion. The simple question is, whether the enactments in the 12th and 15th sections of the Mayor's Court Procedure Act, taken together, are sufficient to give the Mayor's Court jurisdiction in cases within the 12th section, and so to prevent the superior Court from issuing a prohibition. There is no question that the result is that in cases within the 12th section no objection whatever can be taken in the court itself to any want of jurisdiction, and if we affirm the decision of the Common Pleas Division, the consequence will be that, although the Mayor's Court cannot itself take notice of the sup-

(1) Cockburn, C.J., had left the Court just before the conclusion of the argument.

posed want of jurisdiction, it will nevertheless be subject to a prohibition. This result seems to be contrary to principle. The foundation of a prohibition would appear to be that the inferior Court is exceeding its jurisdiction, and is presuming to do what it ought not. The party is not generally bound to take the objection to the Court itself, but the prohibition assumes that the Court is deciding upon what it ought not to decide upon. Here the legislature says that the Court shall decide on this matter, and the Court is precluded from having cognizance of the want of jurisdiction, for there is no mode by which the want of jurisdiction can be brought before it. The necessary conclusion is that the legislature meant that there should be no prohibition in cases within the 12th section. The only argument raised before us to the contrary was that the House of Lords, in the case of *Mayor of London* v. *Cox* (1), put a different construction on the 15th section. The House of Lords held that in cases within that section, but not within the 12th section, although no objection could be taken to the want of jurisdiction in the Mayor's Court except by plea, nevertheless the superior Court could issue a prohibition. But that decision is not in conflict with what we are now deciding. When the 15th section says that there shall be no objection except by way of plea in the Mayor's Court, it follows that by way of plea an objection to the jurisdiction may be taken. This assumes that there is a want of jurisdiction. So in cases within the 15th section, and not the 12th, the very words of the Act shew that there is no jurisdiction. But if there is no jurisdiction, then there must be express words taking away the right of prohibiting from the superior Court, or it will remain. It would be an anomaly that there should be an inferior Court in which there might be a plea to the jurisdiction in cases where there was no jurisdiction, and yet the superior Court should have no right to prohibit. That decision does not apply to a case where the legislature says that in such a case no want of jurisdiction shall be objected to, either by way of plea or in any other way. That is equivalent to saying there shall be jurisdiction. By a necessary implication it follows that the prohibition is taken away.

(1) Law Rep. 2 H. L. 239.

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POLLOCK, B. I agree. There are many authorities in the books to shew that the authority of the Courts at Westminster could not be taken away by local customs or laws. But those authorities have no application to the present case. This Act of Parliament was framed after a variety of enactments had been passed by which the county courts had been established, and a similar jurisdiction to that which we hold is given to the Mayor's Court had been given to them. I think the object of the 12th section was to give the Mayor's Court a similar jurisdiction to that of the county court as to actions for demands under 50*l.*, and when the defendant resides within the jurisdiction. It would be an absurdity if we were to hold that although the defendant himself could not plead the want of jurisdiction in the inferior Court, the superior Court could prohibit. With regard to the effect of the 15th section, there was an obvious reason for such an enactment as the House of Lords construed this section to be. It was very unreasonable that the defendant, when he had appeared and allowed the case to come to trial, and all the costs to be incurred, should be allowed to take the objection of want of jurisdiction by way of application for a nonsuit. It was a very reasonable provision to say that if he wanted to object to the want of jurisdiction in the Mayor's Court he must do it by way of plea.

Judgment reversed.

Solicitors for plaintiff: *Kearney & Co.*
Solicitor for defendant: *Grain.*

[IN THE COURT OF APPEAL.]

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May 29.

NUGENT *v.* SMITH.

Common Carrier—Liability of Shipowner—Act of God.

The defendant, a common carrier by sea from London to Aberdeen, received from the plaintiff a mare to be carried to Aberdeen for hire. In the course of the voyage the ship encountered rough weather, and the mare received such injuries that she died. The jury found that the injuries were caused partly by more than ordinary bad weather, and partly by the conduct of the mare herself by reason of fright and consequent struggling, without any negligence of the defendant's servants:—

Held, reversing the decision of the Court below, that the defendant was not liable for the death of the mare.

The carrier does not insure against the irresistible act of nature, nor against defects in the thing carried itself; and if he can shew that either the act of nature or the defect of the thing itself, or both taken together, formed the sole direct and irresistible cause of the loss, he is discharged. In order to shew that the cause of the loss was irresistible it is not necessary to prove that it was absolutely impossible for the carrier to prevent it, but it is sufficient to prove that by no reasonable precaution under the circumstances could it have been prevented.

Per Cockburn, C.J.: A shipowner, who is not a common carrier, is not subject to the liability of a common carrier—i.e. does not insure the goods bailed to him for carriage.

The question what amounts to an "act of God" within the meaning of that expression, as applied to the carrier's exemption, discussed.

APPEAL from the decision of the Court of Common Pleas, reported ante, p. 19, where the facts are set forth.

Jan. 24, 25. *Benjamin, Q.C.*, and *Holl* (with them *Douglas Walker*), for the defendant. The carrier by sea does not insure against all perils of the sea, but only against those to which the act of man contributes. If the goods are lost by an operation of nature, to which no act of man contributes, the loss is by the act of God, and falls within the well-recognised exception to the liability of a carrier as insurer. Damage to the goods by leakage and such like ordinary incidents of sea transit, are matters against which man can provide, and consequently are not the act of God; but an unusually violent storm is. The reason generally given for the onerous nature of the carrier's duty is the danger of collusion, but

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that does not apply to losses by the operation of nature not contributed to by the act of man. If the carrier is guilty of any neglect to provide against the operations of nature, then the loss ceases to be by the act of God, for human agency has contributed. But in the present case the jury have found that there was no negligence. It is contended that so far as the protection of the goods against the act of God is concerned, the duty of the carrier is only to use due diligence, and the onus is on the plaintiff of shewing the absence of such diligence. Here the plaintiff has failed to sustain that onus; the damage was partly caused by the inherent nature of the animal itself, and partly by the act of God. The carrier is clearly not answerable for a loss occasioned either by an inherent quality of the thing itself or by the act of God. [They cited *Forward* v. *Pittard* (1); *Trent Navigation Co.* v. *Wood* (2); Story on Bailments, s. 511; *Taylor* v. *Dunbar* (3); Angell on Carriers, p. 154; *Colt* v. *McMechen* (4); *Nicholls* v. *Marsland* (5); *Kendall* v. *London and South Western Ry. Co.* (6); *Blower* v. *Great Western Ry. Co.* (7); Parsons on Shipping, vol. 1, p. 253; *Amies* v. *Stevens* (8); *McArthur* v. *Sears* (9); Jones on Bailments, p. 103; *Lloyd* v. *Guibert.* (10)]

Cohen, Q.C., and *Lanyon*, for the plaintiff. The definition of the term "act of God" for which the defendant contends is incorrect so far as concerns the law of carriers. It is not every natural cause to which no act of man has contributed, or against which no diligence could provide, that constitutes an act of God. A storm somewhat more violent than usual is not, within the definition, an act of God. To constitute such there must be something extraordinarily violent, sudden, and overwhelming; something that admits of no time for human intervention between itself and the damage caused. The rule as to carriers is derived from the Roman law, which was not, at any rate in terms, applicable to the case of carriers by land, but of ships navigated by their owners. The foundation of it is not the danger of collusion, as suggested, but the difficulty, where

(1) 1 T. R. 27.
(2) 4 Doug. 287; 3 Esp. 127.
(3) Law Rep. 4 C. P. 206.
(4) 6 Johns. (N.Y.) 160.
(5) Law Rep. 10 Ex. 255.
(6) Law Rep. 7 Ex. 373.
(7) Law Rep. 7 C. P. 655.
(8) 1 Str. 127.
(9) 21 Wendell, 190.
(10) Law Rep. 1 Q. B. 115.

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the ship was navigated by the shipowner and his servants, of proving negligence. Therefore, the only exception to the liability of the carrier by sea was when the damage was occasioned by a cause so violent and immediate in its nature and results as that no question of negligence could arise. It must be something about which there could be no doubt and dispute as to its being the sole cause. The intention was to avoid all doubtful and complex questions as to how far the diligence of the shipowner could have prevented the result of the operation of nature, with respect to which the person whose goods were carried would be at a great disadvantage. Here the operation of nature was not so extraordinary and violent as properly to be called the act of God, and the result did not follow so immediately upon it as to preclude all question of human intervention. Taking the definition suggested by the other side, there was abundance of human intervention in this case. [They cited *Lavaroni* v. *Drury* (1); *Kay* v. *Wheeler* (2); *Smith* v. *Shepherd* (3); *Oakley* v. *Portsmouth and Ryde Steam Packet Co.* (4); *Riley* v. *Horne* (5); *Laurence* v. *Aberdein* (6); *Gabay* v. *Lloyd* (7); Kent's Commentaries, vol. ii. 8th ed. pp. 784, 785.]

Benjamin, Q.C., in reply.

Cur. adv. vult.

May 29. The following judgments were delivered:—

COCKBURN, C.J. This case involves a question of considerable importance as regards the law relating to carriers by sea, but the facts are few and simple. The plaintiff, being the owner of two horses, and having occasion to send them from London to Aberdeen, shipped them on board a steamship belonging to the company of which the defendant is the representative, plying regularly as a general ship between the two ports. The horses were shipped without any bill of lading. In the course of the voyage a storm of more than ordinary violence arose; and partly from the rolling of the vessel in the heavy sea, partly from strug-

(1) 8 Ex. 166; 22 L. J. (Ex.) 2.
(2) Law Rep. 2 C. P. 302.
(3) Abbott on Shipping, 11th ed. p. 328.
(4) 11 Ex. 618; 25 L. J. (Ex.) 99.
(5) 5 Bing. 217.
(6) 5 B. & Ald. 107.
(7) 3 B. & C. 793.

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gling caused by excessive fright, one of the animals, a mare, received injuries from which she died. It is to recover damages in respect of her loss that this action is brought.

The jury, in answer to a question specifically put to them, have expressly negatived any want of due care on the part of the defendant, either in taking proper measures beforehand to protect the horses from the effects of tempestuous weather, or in doing all that could be done to save them from the consequences of it after it had come on. A further question put to the jury was, whether there were any known means, though not ordinarily used in the conveyance of horses by people of ordinary care and skill, by which the defendant could have prevented the injury to the mare, but to this question the jury returned no answer. The question is, whether, on this state of facts, the shipowners are liable.

For the defendant, it was insisted that the storm, which was the primary, and in a partial degree the proximate, cause of the loss, must be taken to have been an "act of God" within the legal meaning of that term, so as, all due care having been taken to convey the mare safely, to afford immunity to the defendant's company as carriers from liability in respect of the loss complained of; and the question to be determined is, whether this contention is well founded.

The judgment of the Common Pleas Division in favour of the plaintiff, as delivered by Mr. Justice Brett, involves, if I rightly understand it, the following propositions: 1. That the Roman law relating to bailments has been adopted by our Courts as part of the common law of England; 2. That, by the Roman law, the owners of all ships, whether common carriers or not, are equally liable for loss by inevitable accident; 3. That such is the rule of English law as derived from the Roman law, and as evidenced by English authorities; 4. That, to bring the cause of damage or loss within the meaning of the term "act of God," so as to give immunity to the carrier, the damage or loss in question must have been caused directly and exclusively by such a direct and violent and sudden and irresistible act of Nature as the defendant could not, by any amount of ability, foresee would happen, or, if he could foresee that it would happen, he could not by any amount of care and skill resist, so as to prevent its effect; 5. That, notwithstanding

the inability of the jury to agree to an answer to the fifth question left to them, the defendant has in this case failed to satisfy the burden of proof cast upon him, so as to bring himself clearly within the definition, as it is impossible to say that no human ability could foresee the reasonable probability of the happening of rough weather on the voyage, and that a horse at sea might be frightened by it, or that no human ability could prevent injury to a frightened horse in such weather as occurred.

In no part of this reasoning am I able to concur. But before I proceed to deal with it, I must observe that, as the vessel by which the mare was shipped was one of a line of steamers plying habitually between given ports and carrying the goods of all comers as a general ship, and as from this it necessarily follows that the owners were common carriers, it was altogether unnecessary to the decision of the present case to determine the question so elaborately discussed in the judgment of Mr. Justice Brett as to the liability of the owner of a ship, not being a general ship, but one hired to carry a specific cargo on a particular voyage, to make good loss or damage arising from inevitable accident. The question being, however, one of considerable importance—though its importance is materially lessened by the general practice of ascertaining and limiting the liability of the shipowner by charterparty or bill of lading—and the question not having before presented itself for judicial decision, I think it right to express my dissent from the reasoning of the Court below, the more so as, for the opinion thus expressed, I not only fail to discover any authority whatever, but find all jurists who treat of this form of bailment carefully distinguishing between the common carrier and the private ship. Parsons, a writer of considerable authority on this subject, defines a common carrier to be "one who offers to carry goods for any person between certain termini and on a certain route." "He is bound to carry for all who tender to him goods and the price of carriage, and insures these goods against all loss but that arising from the act of God or the public enemy, and has a lien on the goods for the price of the carriage." "If either of these elements is wanting, we say the carrier is not a common carrier, either by land or by water." "If we are right in this," he adds, "no vessel will be a common carrier that does not ply regularly, alone or in

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connection with others, on some definite route, or between two certain termini." (1) Story seems to be of a like opinion. "When it is said," he observes, "that the owners and masters of ships are deemed common carriers, it is to be understood of such ships as are employed as general ships, or for the transportation of merchandise for persons in general, such as vessels employed in the coasting trade, or foreign trade, or on general freighting business, for all persons offering goods on freight for the port of destination." "But if the owner of a ship employs it on his account generally, or if he lets the tonnage, with a small exception, to a single person, and then, for the accommodation of a particular individual, he takes goods on board for freight, not receiving them for persons in general, he will not be deemed a common carrier, but a mere private carrier." (2) So Angell, speaking of shipowners as common carriers, says: "When it is said that the owners and masters of ships are treated as common carriers, it is to be understood of such ships as are employed for the transportation of merchandise for all persons indifferently. Should the owner of a ship employ it on his own account, and for the special accommodation of a particular individual, take goods on board for freight, not receiving them from all persons indifferently, he does not come within the definition of a common carrier, he not holding himself out as engaged in a public employment." (3) But the learned author does not say what would be the case where a shipowner holds himself out as ready to send his vessel with cargo to any place that may be agreed on, on a private bargain, and not as a general ship.

In the absence of all common-law authority for the proposition that by the law of England every carrier by sea is subject to the same liability as the common carrier, as asserted in the judgment below, the authority of the Roman law is invoked; but this law, on which so much stress is laid in the judgment of the Court of Common Pleas, affords no support to this doctrine. In the first place, it is a misapprehension to suppose that the law of England relating to the liability of common carriers was derived from the Roman law; for the law relating to it was first established by our Courts with reference to carriers by land, on whom the Roman

(1) Parsons, Shipping, p. 245. (2) Story on Bailments, s. 501.
(3) Angell on Carriers, s. 89.

law, as is well known, imposed no liability in respect of loss beyond that of other bailees for reward. In the second place, the Roman law made no distinction between inevitable accident arising from what in our law is termed the "act of God" and inevitable accident arising from other causes, but, on the contrary, afforded immunity to the carrier, without distinction, whenever the loss resulted from "casus fortuitus," or, as it is also called, "damnum fatale," or "vis major"—unforeseen and unavoidable accident. The language of the Prætorian Edict, as given in the Digest, might indeed, if it stood alone, lead to the supposition that the liability of the carrier by sea was unlimited: "Ait prætor: nautæ, caupones, stabularii quod cujusque salvum fore receperint, nisi restituant, in eos judicium dabo." (Dig. iv. tit. 9), But Ulpian, who gives the words quoted in his treatise on the Edict, explains their meaning: "Hoc edicto omni modo qui recepit tenetur, etiam si sine culpa ejus res periit vel damnum datum est, nisi si quid damno fatali contingit. Inde Labeo scribit, si quid naufragio aut per vim piratarum perierit, non esse iniquum exceptionem ei dari. Idem erit dicendum si in stabulo aut in cauponâ vis major contigerit."

In the one case the absence of culpa makes no difference. In the other it does. No difference of opinion exists among civilians as to the law on this subject. There is no doubt that inevitable accident—damnum fatale, casus fortuitus, vis major—for these are synonomous terms—exempt the carrier from liability. "Casus fortuitus," says Averani, "appellatur vis major, vis divina, fatum, damnum fatale, fatalitas."

Such is the Roman law, and such is the existing law of all the nations which have adopted the Roman law—France, Spain, Italy, Germany, Holland, and, to come nearer home, Scotland. It is embodied in the Code Civil of France. Treating of carriers by land and by water the Code says (Art. 1754): "Ils sont responsables de la perte et des avaries des choses qui leur sont confiées, à moins qu'ils ne prouvent qu'elles ont été perdues et avariées par cas fortuit ou force majeure."

That such is the law of Scotland we learn from what is said in Erskine's Institutes, pp. 591, 592, n., from which it appears that by that law, not only storm and pirates, but also housebreaking and

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fire, constitute damnum fatale, which will exonerate the innkeeper or carrier. (See also the Appendix to Stair's Institutes, by More, p. 57.) But not only does this essential difference between the Roman law and our own suffice to shew that, so far as the liability of carriers is concerned, our law has not been derived from the Roman: as matter of legal history we know that the more rigorous law of later times, first introduced during the reign of Elizabeth, was, in the first instance, established with reference to carriers by land to whom by the Roman law no such liability attached. It was not till the ensuing reign, in the eleventh of James I., that it was decided, in *Rich* v. *Kneeland* (1), that the common hoyman or carrier by water stood on the same footing as a common carrier by land, and rightly, for in principle there could be no difference between them. The next case in point of date, and it is the first case in the books in which the liability of the owner of a sea-going ship comes in question, is the well-known case of *Morse* v. *Slue* (2), in which it was held, after a trial at bar, that where a ship lying in the Thames was boarded by robbers, who took the plaintiff's goods which had been loaded on board, in an action brought against the master, the plaintiff was entitled to recover. And it certainly surprises me that this case should be relied on as an authority for the position that the liability of a common carrier attaches to the shipowner or master where the ship is not a general ship; for though it is not expressly said that the ship in question was a general ship, which has led to the somewhat hasty assumption that she was not, the internal evidence shews conclusively that she was so. In the first place, the declaration is laid on the custom of the realm, and we know that the only custom to which effect had up to that time been given—and that quite in recent times—was in respect of common carriers by land, and still more recently in respect of common carriers by water. Secondly, Hale, C.J., in giving judgment, puts the case as on all fours with that of a common carrier or hoyman, and nowhere says that it is to be treated as that of a private ship. "He who would take off the master from this action," says the Chief Justice, "must assign a difference between it and the case of a hoyman, common carrier,

(1) Cro. Jac. 330; Hob. 17. (2) 1 Vent. 190, 238.

or innholder." Doubtless the counsel for the defendant, if the case had been distinguishable on the ground that the vessel was not a common ship, would have pointed out the difference, and at all events have taken the point; and in the corresponding report of the same case in Levinz (1), the case of *Rich* v. *Kneeland* (2) having been referred to, the Chief Justice is reported to have said that the case "differed not from that of the hoyman." But in the case of *Rich* v. *Kneeland* (2) we know that the barge or hoy was a common carrier; and it is obvious that if in *Morse* v. *Slue* (3) the vessel had been a private one, instead of treating the case as identical with that of the common hoyman, the Chief Justice would have put it on the ground that all sea-going vessels were subject to the larger liability. But besides this, there is a circumstance which appears to have been overlooked, which seems decisive to shew that the ship must have been a general ship. It is mentioned in the report in Ventris, that the ship was a vessel of 150 tons burden, bound for Cadiz, and that the goods shipped by the plaintiff consisted of three trunks, containing 400 pairs of silk stockings and 174 lbs. of silk. It seems idle to suppose that a ship of that size would have been hired on such a voyage for the purpose of carrying the plaintiff's three trunks as her entire cargo. There seems, therefore, no reasonable doubt that the ship was a general ship. In like manner, in the case of *Dale* v. *Hall* (4), although the declaration was not upon the custom of the realm, but upon the implied obligation to carry safely, it appearing that the defendant was a shipmaster or keelman who carried goods from port to port, the Court decided in favour of the plaintiff, expressly on the liability of the defendant as a common carrier (though the latter was prepared to shew an absence of negligence on his part), on the ground that the allegation of the duty of a common carrier "to carry safely" was equivalent to a declaration on the custom of the realm. In the subsequent case of *Barclay* v. *Cuculla y Gana* (5), which was a case where, as in *Morse* v. *Slue* (3), goods had been forcibly taken by thieves from a ship lying in the Thames, on the objection being taken on behalf of the defendant

(1) 2 Lev. 69.
(2) Cro. Jac. 330; Hob. 17.
(3) 1 Vent. 190, 238.
(4) 1 Wils. 281.
(5) 3 Doug. 389.

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that he was not charged in the declaration on the custom of the realm, while there was neither express undertaking nor negligence to make him liable otherwise, the answer of the Court was "that there was no question at the trial as to the ship being a general ship;" and Lord Mansfield adds that it was impossible to distinguish the case from that of a common carrier.

Thus far the reported cases as to carriers by sea have been cases of general vessels. The next in point of time, that of *Lyon* v. *Mells* (1), was one in which the defendant kept sloops for carrying other persons' goods for hire, and also lighters for carrying such goods to and from his sloops as well as to and from the sloops of other owners. One of these lighters, in which goods of the plaintiff were being conveyed on board a sloop, proved leaky and took in a quantity of water, and the goods became seriously damaged, and it was also found as a fact that the goods had been negligently stowed. The defendant relied on a notice that he would not be answerable for any loss or damage unless occasioned by want of ordinary care of the master and crew, in which case he would pay 10 per cent. on the loss or damage; but that persons desirous of having their goods carried free from any risk in respect of loss or damage, whether arising from the act of God or otherwise, might have them so carried on entering into an agreement to pay extra freight in proportion to the risk. No extra freight having been paid, the question was whether the defendant was protected by this notice from liability for more than 10 per cent. of the damage. Nothing in reality turned upon his being a common carrier or subject to the liabilities of a common carrier. Some discussion, it is true, took place on the argument as to whether the defendant was a common carrier or not; but Lord Ellenborough, in giving judgment, put the matter on the right footing, namely, that a carrier by water impliedly engages that his vessel shall be water-tight, an obligation obviously applicable to all carriers, whether common carriers or otherwise, and that the defendant could not be taken to have intended by such a notice to claim immunity in respect of his own breach of contract, but only immunity above 10 per cent. for loss or damage arising from the negligence of the master and crew, and total immunity in respect of loss or damage from the act of God or other

(1) 5 East. 428.

cause, unless extra freight was paid. The owner no doubt thought his liability that of a common carrier, and, as Lord Ellenborough points out, sought to protect himself accordingly; but Lord Ellenborough nowhere treats him as such, but decides the case on a general ground applicable to all carriers, whether common or private. Yet this case is relied on, erroneously as it appears to me, as shewing that a man who lets out a lighter or ship, not to carry the goods of general comers, but to a particular individual on a specific job or contract, if his business be to let out lighters or ships, is a common carrier, or is at all events subject to an equal degree of liability. The last case is that of the *Liver Alkali Co.* v. *Johnson* (1), in which the defendant was a barge owner and let out his vessels for conveyance of goods to any customers who applied to him. Each voyage was made under a separate agreement, and a barge was not let to more than one person for the same voyage. The defendant did not ply between any fixed termini, but the customer fixed in each particular case the points of arrival and departure. In an action against the defendant by the plaintiffs for not safely and securely carrying certain goods, the Court of Exchequer Chamber held, affirming the judgment of the Court of Exchequer, that the defendant was a common carrier and liable as such. Mr. Justice Brett, differing from the majority, held that the defendant was not a common carrier, but, asserting the same doctrine as in the judgment now appealed from, held him liable upon a special custom of the realm attaching to all carriers by sea, of which custom, however, as I have already intimated, I can find no trace whatever. We are, of course, bound by the decision of the Court of Exchequer Chamber in the case referred to as that of a court of appellate jurisdiction, and which, therefore, can only be reviewed by a court of ultimate appeal; but I cannot help seeing the difficulty which stands in the way of the ruling in that case, namely, that it is essential to the character of a common carrier that he is bound to carry the goods of all persons applying to him, while it never has been held, and, as it seems to me, could not be held, that a person who lets out vessels or vehicles to individual customers on their application was liable to an action for refusing the use of such vessel or vehicle if required to fur-

(1) Law Rep. 9 Ex. 338.

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nish it. At all events, it is obvious that as the decision of the Court of Exchequer Chamber proceeded on the ground that the defendant in that case was a common carrier, the decision is no authority for the position taken in the Court below, that all shipowners are equally liable for loss by inevitable accident. It is plain that the majority of the Court did not adopt the view of Mr. Justice Brett. Lastly, while it does not lie within our province to criticise the law we have to administer or to question its policy, I cannot but think that we are not called upon to extend a principle of extreme rigour, peculiar to our own law, and the absence of which in the law of other nations has not been found by experience to lead to the evils for the prevention of which the rule of our law was supposed to be necessary, further than it has hitherto been applied. I cannot, therefore, concur in the opinion expressed in the judgment delivered by Mr. Justice Brett, that by the law of England all carriers by sea are subject to the liability which by that law undoubtedly attaches to the common carrier whether by sea or by land.

But there being no doubt that in the case before us the shipowner was a common carrier, we have now to deal with the question on which the decision really turns, namely, whether the loss was occasioned by what can properly be called the "act of God."

The definition which is given by Mr. Justice Brett, of what is termed in our law the "act of God" is, that it must be such a direct, and violent, and sudden, and irresistible act of Nature as could not by any amount of ability have been foreseen, or if foreseen, could not by any amount of human care and skill have been resisted. The judgment then proceeds: "We cannot say, notwithstanding the inability of the jury to agree to an answer to the fifth question left to them, that the defendant has in this case satisfied the burden of proof cast upon him so as to bring himself clearly within the definition. It seems to me impossible to say that no human ability could foresee the reasonable probability of the happening of rough weather on the voyage, and that a horse at sea might be frightened by it, or that no human ability could prevent injury to a frightened horse in such weather as occurred."

The exposition here given appears to me too wide as regards

the degree of care required of the shipowner, and as exacting more than can properly be expected of him. It is somewhat remarkable that previously to the present case no judicial exposition has occurred of the meaning of the term "act of God," as regards the degree of care to be applied by the carrier in order to entitle himself to the benefit of its protection. We must endeavour to lay down an intelligible rule.

That a storm at sea is included in the term "act of God," can admit of no doubt whatever Storm and tempest have always been mentioned in dealing with this subject as among the instances of vis major coming under the denomination of "act of God." But it is equally true, as has already been pointed out, that it is not under all circumstances that inevitable accident arising from the so-called act of God will, any more than inevitable accident in general by the Roman and continental law, afford immunity to the carrier. This must depend on his ability to avert the effects of the vis major, and the degree of diligence which he is bound to apply to that end.

It is at once obvious, as was pointed out by Lord Mansfield in *Forward* v. *Pittard* (1), that all causes of inevitable accident—"casus fortuitus"—may be divided into two classes—those which are occasioned by the elementary forces of nature unconnected with the agency of man or other cause, and those which have their origin either in the whole or in part in the agency of man, whether in acts of commission or omission, of nonfeasance or of misfeasance, or in any other cause independent of the agency of natural forces. It is obvious that it would be altogether incongruous to apply the term "act of God" to the latter class of inevitable accident. It is equally clear that storm and tempest belong to the class to which the term "act of God" is properly applicable.

On the other hand, it must be admitted that it is not because an accident is occasioned by the agency of nature, and therefore by what may be termed the "act of God," that it necessarily follows that the carrier is entitled to immunity. The rain which fertilises the earth and the wind which enables the ship to navigate the ocean are as much within the term "act of God" as the rainfall which causes a river to burst its banks and carry destruction over

(1) 1 T. R. 27.

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a whole district, or the cyclone that drives a ship against a rock or sends it to the bottom. Yet the carrier who by the rule is entitled to protection in the latter case, would clearly not be able to claim it in case of damage occurring in the former. For here another principle comes into play. The carrier is bound to do his utmost to protect goods committed to his charge from loss or damage, and if he fails herein he becomes liable from the nature of his contract. In the one case he can protect the goods by proper care, in the other it is beyond his power to do so. If by his default in omitting to take the necessary care loss or damage ensues, he remains responsible, though the so-called act of God may have been the immediate cause of the mischief. If the ship is unseaworthy, and hence perishes from the storm which it otherwise would have weathered; if the carrier by undue deviation or delay exposes himself to the danger which he otherwise would have avoided; or if by his rashness he unnecessarily encounters it, as by putting to sea in a raging storm, the loss cannot be said to be due to the act of God alone, and the carrier cannot have the benefit of the exception. This being granted, the question arises as to the degree of care which is to be required of him to protect him from liability in respect of loss arising from the act of God. Not only, as has been observed, has there been no judicial exposition of the meaning of the term "act of God" as regards the degree of care to be applied by the carrier in order to entitle himself to its protection, but the text-writers, both English and American, are, for the most part, silent on the subject and afford little or no assistance. Being here, however, on common ground with the civilians, so far as one head of inevitable accident is concerned, it may be of use, while endeavouring more clearly to fix the limits of that class of inevitable accidents which comes under the head of "act of God," to turn to their views on the subject with reference to inevitable accidents in general As the result of the different instances of casus fortuitus which occur in the Digest, Vinnius gives the following definition: "Casum fortuitum definimus omne quod humano cœptu prævideri non potest, nec cui proviso potest resisti" (Partit. Juris. lib. ii. c. 66). He enumerates various instances: "Casus fortuiti varii sunt: veluti a vi ventorum, turbinum, pluviarum, grandinum, fulminum, æstus, frigoris, et similium calamitatum quæ cœlitus immittuntur.

Nostri vim divinam dixerunt. Græci, *θεοῦ βίαν*. Item naufragia, aquarum inundationes, incendia, mortes animalium, ruinæ ædium, fundorum chasmata, incursus hostium, prædonum impetus. His adde damna omnia a privatis illata, quæ quominus inferrentur nullâ curâ caveri potest." Baldus (Quæst. 12, no. 4), gives the following definition: "Casus fortuitus est accidens, quod per custodiam, curam, vel diligentiam mentis humanæ non potest evitari ab eo qui patitur."

In our own law on this subject judicial authority, as has been stated, is wanting, and the text writers, English and American, with one exception, afford little or no assistance. Story, however, in speaking of the perils of the sea, in which storm and tempest are of course included, and consequently to a great extent the instances of inevitable accident at sea which come under the term "act of God," uses the following language: "The phrase 'perils of the sea,' whether understood in its most limited sense, as importing a loss by natural accidents peculiar to that element, or whether understood in its more extended sense as including inevitable accidents occurring upon that element, must still in either case be understood to include such losses only to the goods on board as are of an extraordinary nature or arise from some irresistible force, or from inevitable accident, or from some overwhelming power which cannot be guarded against by ordinary exertions of human skill and prudence. Hence it is that if the loss occurs by a peril of the sea which might have been avoided by the exercise of any reasonable skill or diligence at the time when it occurred, it is not deemed to be in the sense of the phrase such a loss by the perils of the sea as will exempt the carrier from liability, but rather a loss by the gross negligence of the party." (1) Story, it will be observed, here speaks only of "ordinary exertion of human skill and prudence and the exercise of reasonable skill and diligence." In my opinion this is the true view of the matter, and what Story here says of perils of the sea applies, I think, equally to the perils of the sea coming within the designation of "acts of God." In other words, all that can be required of the carrier is that he shall do all that is reasonably and practically possible

(1) Story on Bailments, 512 (a).

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to insure the safety of the goods. If he uses all the known means to which prudent and experienced carriers ordinarily have recourse, he does all that can be reasonably required of him; and if, under such circumstances, he is overpowered by storm or other natural agency, he is within the rule which gives immunity from the effects of such vis major as the act of God. I do not think that because some one may have discovered some more efficient method of securing the goods which has not become generally known, or because it cannot be proved that if the skill and ingenuity of engineers or others were directed to the subject something more efficient might not be produced, that the carrier can be made liable. I find no authority for saying that the vis major must be such as "no amount of human care or skill could have resisted," or the injury such as "no human ability could have prevented," and I think this construction of the rule erroneous. That the defendants here took all the care that could reasonably be required of them to insure the safety of the mare is, I think, involved in the finding of the jury, directly negativing negligence, and I think that it was not incumbent on the defendants to establish more than is implied by that finding.

The matter becomes, however, somewhat complicated from the fact that the jury have found that the death of the mare is to be ascribed to injuries caused partly by the rolling of the vessel, partly by struggles of the animal occasioned by fright, leaving it doubtful whether the fright was the natural effect of the storm or whether it arose from an unusual degree of timidity peculiar to the animal and in excess of what would generally be displayed by horses. But the plaintiff is in this dilemma: if the fright which led to the struggling of the mare was in excess of what is usual in horses on ship-board in a storm, then the rule applies that the carrier is not liable where the thing carried perishes or sustains damage, without any fault of his, by reason of some quality inherent in its nature, and which it was not possible for him to guard against. If, on the other hand, the fright was the natural effect of the storm and of the agitation of the ship, then it was the immediate consequence of the storm, and the injuries occasioned by the fright are sufficiently closely connected with the storm, in other

words with the act of God, to afford protection to the carrier. If the disaster is the result of a combination of causes for neither of which the carrier was responsible, he cannot be made liable any more than if it had resulted from either of them alone.

For these reasons I am of opinion that the judgment of the Court below must be reversed, and judgment entered for the defendant.

MELLISH, L.J. I do not wish to give any opinion on the question whether the defendant, if he had not been a common carrier, would have been subject to the liability of a common carrier. It is unnecessary to give any opinion on that question, because it was admitted in the argument before us that the defendant was a common carrier. I agree with the Lord Chief Justice that the judgment of the Common Pleas Division ought to be reversed, and generally with the reasons he has given in his judgment. If the jury had found that the injury to the mare was caused solely by more than ordinary bad weather, without any negligence of the defendant's servants, or any fright and consequent struggling of the mare, I am of opinion that a plea that the injury to the mare was caused by the act of God would have been proved. It is obvious that if a horse is properly secured on deck and properly attended to by the carrier's servants, and is quiet, and nevertheless is so injured as to be killed by the pitching of the vessel, the violence of the storm must be very great indeed, and the whole accident would be of such an extraordinary character as plainly to amount to the act of God within the authorities. So also, if the jury had found that the injury was caused solely by the conduct of the mare herself by reason of fright and consequent struggling, without any negligence on the part of the defendant's servants, I am of opinion that a plea that the injury to the mare was caused by the vice of the mare herself would have been proved.

The cases of *Kendall* v. *London and South Western Ry. Co.* (1) and *Blower* v. *Great Western Ry. Co.* (2) are direct authorities to this effect. Now if these conclusions are correct, it seems to me it

(1) Law Rep. 7 Ex. 373. (2) Law Rep. 7 C. P. 655.

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would be absurd to hold that although the injury to the mare was occasioned by two causes combined, for neither of which the carrier was responsible, nevertheless he was liable.

It may no doubt be true that, as the injury of the mare was not solely occasioned by more than ordinary bad weather, the bad weather may not have been so bad as to deserve the description of a direct, and violent, and sudden, and irresistible act of Nature, which in the Court below it was said it must amount to, in order to amount to an act of God.

The bad weather may not have been irresistible, because if it had not been for the conduct of the mare herself, it might have been resisted, so also the conduct of the mare herself may not have been the sole and irresistible cause of the injury, because if it had not been for the bad weather, any injurious effect from the fright and struggling of the mare might by reasonable precautions have been prevented.

Still it may be perfectly true, and I think the jury must be taken to have found it was true, that the more than ordinary bad weather, and the fright and struggling of the mare herself, did together form a direct, and violent, and irresistible cause of the damage which the mare suffered. In the court below, the learned judges first consider the question whether the loss in this case can be considered to have occurred by the act of God, and, because the bad weather did not, in their opinion, amount to a direct, and violent, and sudden, and irresistible act of Nature, they come to the conclusion that the loss was not occasioned by the act of God. They then consider whether the loss was occasioned by the vice of the mare herself, and because they think that the fright and struggling of the mare was occasioned principally by the bad weather, they hold that the loss was not occasioned by the vice of the mare herself. The objection to this mode of considering the case seems to me to be that the two causes of loss are considered separately, and because neither, taken separately, affords an answer to the plaintiff's claim, it is assumed that both taken together cannot afford an answer. Now, I am of opinion we ought to hold that, notwithstanding neither the more than ordinary bad weather, nor the fright and struggling of the mare herself, each

taken separately, were sufficient to account for the loss; yet, if both taken together formed an irresistible cause of the loss in this sense, that by no reasonable precaution on the part of the carrier could the damage resulting from them have been prevented, the carrier is protected. It being a clear rule of law, that if the loss of the goods carried is occasioned by an irresistible act of Nature, the carrier is protected; and another clear rule of law, that if the loss of the goods is solely occasioned by a defect in the thing itself, the carrier is also protected; it seems to me to follow that, if the loss is occasioned partly by an act of Nature, although one not by itself irresistible, and partly by a defect in the thing itself, although that defect is not the sole cause of the loss, and the carrier has no means of preventing the combined effect of the two causes, he ought to be held to be protected.

The principle seems to me to be that a carrier does not insure against acts of Nature, and does not insure against defects in the thing carried itself, but in order to make out a defence the carrier must be able to prove that either cause, taken separately, or both taken together, formed the sole and direct and irresistible cause of the loss. I think, however, that in order to prove that the cause of the loss was irresistible, it is not necessary to prove that it was absolutely impossible for the carrier to prevent it, but that it is sufficient to prove that by no reasonable precaution under the circumstances could it have been prevented. For these reasons I am of opinion that the judgment of the court below ought to be reversed, and the rule to enter a verdict for the plaintiff discharged.

CLEASBY, B. I should hesitate to decide this case upon the general ground, much insisted on during the argument, that where there is a loss or destruction of anything entrusted to a carrier from natural causes, without the intervention of any human agency, the carrier is discharged. In other words, that the exception of "the act of God" from the carrier's responsibility applied to every condition of things resulting from natural causes. The words "act of God," as applied to the carrier's exemption, comprehend no doubt such events as earthquakes, and all other convulsions of

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nature. Violent storms and tempests have always been considered as coming within the words, and men have thought they could avert them by prayers and offerings. Mr. Wallace, the American editor of Smith's Leading Cases, as cited in the note to Angell on Carriers, s. 155 (p. 153), attempts a definition. "Upon the whole it would seem that the act of God signifies the extraordinary violence of nature."

This entirely disapproves of those two American cases referred to in the argument, *Colt* v. *M'Mechen* (1) and *Williams* v. *Grant* (2), which appeared to go to the extent of shewing that "act of God" and "act of Nature" meant the same thing. I mean, of course, "act of God" as applied to the carrier's exception. I would not adopt this or any definition as exact and including all cases, but wherever there is that unusual violence of nature, against which, in the opinion of the jury, precautions would be considered unavailing, and could not be expected to be taken, I should say the case would come within the exception. Now how does the present case stand as regards this?

I should have been better satisfied if the note of the case had shewn more distinctly that there had been in this case the intervention of the act of God in the sense which I have mentioned.

Still, looking at the language of the questions put to the jury, and the answers, it is a fair conclusion, I think, that the weather was of such a nature "more than ordinary bad weather," as to come within the meaning of "act of God." It seems to have been argued in that way, and if that be so, the judgment of the Court below is subject to this criticism, that though the carrier is excused by the "act of God," he is yet bound to use precautions against the "act of God." This seems an inconsistency, and I should feel fully justified in saying that if the "act of God" and the nature of the animal combined to produce the injury, the defendants would be discharged.

The fifth question asks, "were there known means not ordinarily used in the carriage of horses by sea by people of ordinary care and skill, by which the injury might be prevented?" It is

(1) 6 Johns. Rep. (N.Y.) 160. (2) 1 Conn. 487.

not surprising the jury could not agree upon an answer to this question. Some would say it must be possible to use means to attain this end, and of course they could not be unknown contrivances, but known to persons of skill, and this would lead to one answer; others would say the only known means, in the proper sense of the words, were means in use, that is in ordinary use, and this would lead to an opposite answer. It does not appear to me that an answer to that question was essential to determine the case, because, whichever way it was answered, the answers to the other questions, particularly the fourth, determine the case in favour of the defendants. I consider it expressly found that there was no negligence on the part of the defendants in any way contributing to the injury.

If the second question had been answered in the affirmative, the case would have come within the authority of decided cases. Carriers of live animals are not, as such, without negligence, responsible for injury to or death of the animals carried by themselves: *Blower* v. *Great Western Ry. Co.* (1); *Kendall* v. *London and South Western Ry. Co.* (2) But in the present case it appears that the injuries were due to two causes together, the rough weather and the nature of the animal. If the extraordinary rough weather can be regarded as the act of God within the meaning of those words in the exception, then, as I have before stated, the case appears clear; but if it be not, still, as the jury have negatived negligence in their answer to the fourth question, it amounts to this, that the defendants took all reasonable and proper precautions against rough weather, but still the extraordinary bad weather and nature of the animal caused the injury. This, in my opinion, is sufficient to absolve the carriers; because all negligence being negatived, they cannot be said in any way to have contributed to the injury, and so far as being carriers they are insurers, this liability does not extend to injuries caused by the animals themselves, and even though the extraordinary rough weather may have contributed directly, yet no correct conclusion could be founded upon the joint operation of the two causes, as no division could be made of the result caused by each. The third

(1) Law Rep. 7 C. P. 655. (2) Law Rep. 7 Ex. 373.

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finding negatives the injury being caused by the rough weather alone; and as it follows that the character and conduct of the animal must have been an effective cause, the sounder conclusion seems to be that the plaintiff fails in making out a case to recover anything, rather than that the defendants are to be made responsible for the whole consequences of both causes combined.

The effect of this opinion is that the judgment of the court below should be reversed.

MELLISH, L.J., stated that James, L.J., concurred that the decision of the Court below must be reversed, and desired to add the following observation. The "act of God" is a mere short way of expressing this proposition. A common carrier is not liable for any accident as to which he can shew that it is due to natural causes directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected from him. In this case the defendant has made this out.

MELLOR, J., agreed that the judgment of the court below must be reversed.

Judgment reversed.

Solicitors for plaintiff: *Lawrance, Plews, & Boyer.*
Solicitors for defendant: *Lyne & Holman.*

FARMELOE AND ANOTHER *v.* BAIN AND ANOTHER. 1876

Contract of Sale—Unappropriated Goods—Undertaking to deliver to Vendee's Order—Unpaid Vendor—Estoppel. *Feb.* 11.

The defendants sold to B. & Co. 100 tons of zinc (unappropriated) upon certain terms of payment, giving them at the time of the contract four several documents to the following effect:—"We hereby undertake to deliver to your order indorsed hereon twenty-five tons merchantable sheet zinc off your contract of this date." Upon the faith of these documents, the plaintiffs bought of B. & Co., and paid for, fifty tons of the zinc mentioned in the contract. B. & Co. having failed, and the contract price being unpaid, the defendants refused to deliver the zinc:—

Held, that the giving of these delivery orders or "undertakings" did not estop the defendants from setting up, as against the vendees of B. & Co., their right as unpaid vendors to withhold delivery.

DETINUE and trover for fifty tons of zinc, and damages for the detention: claim, 3000*l*.

Pleas, to the first count,—1. Non detinent,—2. Not possessed,—3. That before the alleged detention the defendants sold the goods to Messrs. Burrs & Co. at and for a certain price payable for the same by Burrs & Co. to the defendants, and afterwards, and before the alleged detention, Burrs & Co. were insolvent and unable to pay their debts or the said price, and stopped payment, and the goods never were delivered, but from the time of the said sale up to and at the time of the alleged detention, and thenceforth hitherto remained in the possession of the defendants as such vendors as aforesaid, and the price during all that time remained unpaid to the defendants; that the plaintiffs never had any right or title in or to the goods save under and through Burrs & Co.; and that thereupon the defendants detained the goods from the plaintiffs, the price never having been paid or tendered to the defendants, as a lien or security for the payment thereof, all conditions being fulfilled and existing requisite to make the same valid, which was the alleged detention,—4. That the defendants detained the goods as alleged under and by virtue of a lien of the defendants on the same for the payment of the price thereof to the defendants as and being the sellers of the goods, the defendants never having delivered the goods or parted with the possession thereof, and the price being payable at or before the delivery of

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the goods and never having been paid or tendered to the defendants, and such lien then being subsisting and in force, and available and valid against the plaintiffs.

Pleas to the second count, not guilty, and not possessed.

The plaintiffs took and joined issue on all the pleas; and, for a second replication, on equitable grounds, to the third plea, said that the defendants at the time of the sale of the goods to Burrs & Co. traded under the name, style, and firm of "The Harford and Bristol Brass Company," and that they ought not to be admitted to plead the said plea, because, at the time of the sale by the defendants of the goods to Burrs & Co., the defendants made and gave to Burrs & Co. two written undertakings for the delivery of the said goods, each in the words and figures following:—"Golden Heart Wharf, Dowgate, London, 31st of December, 1873, E.C. Messrs. Burrs & Co., 61, Gracechurch Street. We hereby undertake to deliver to your order indorsed hereon twenty-five tons merchantable sheet zinc, off your contract of this date. Harford & B. B. Co., per E. G. Wilson;" that the defendants signed the said undertakings by their lawfully authorized agent, E. G. Wilson, thereby intending that the same should operate as a representation to all persons to whom the same should be shewn that the goods therein mentioned were the property of Burrs & Co. free from all lien or claim whatsoever on the part of the defendants; that such undertakings were indorsed and delivered to the plaintiffs by Burrs & Co. when they purchased and paid for the said goods; that it was upon the faith of the said representation and of such undertakings that the plaintiffs purchased of and paid for the said goods to Burrs & Co., and not otherwise, and which purchase-money of 1475*l.* had never been returned to the plaintiffs, and the said contract was still in force.

To this equitable replication the defendants demurred, on the grounds that "the document set out did not amount to a representation that Burrs & Co. were possessed of the goods mentioned in the declaration, or an engagement that the defendants would waive their lien, nor did the replication shew that the plaintiffs were misled." Joinder.

The cause was tried before Denman, J., at the sittings in London after Trinity Term, 1875. The facts were as follows:—On the

31st of December, 1873, the defendants, who traded under the name of The Harford and Bristol Brass Company, sold to Messrs. Burrs & Co. 100 tons of sheet zinc, and on the same day addressed to them a letter, as follows:—

"Golden Heart Wharf, Dowgate,
"London, 31st December, 1873.

"Messrs. Burrs & Co.

"Dear sirs,—We beg to confirm the sales made you this day of merchantable sheet zinc, viz.

"50 tons at 32*l.* 15*s.*, less 2½ and 1 per cent., payable half on 7th, remainder 14th February next.

"50 tons at 33*l.*, less 1¼ and 1 per cent., payable by your draft on Messrs. Pitchford & Co., at three months date from 1st of January, indorsed over to us; and we inclose a statement of the amount of the draft, 1612*l.* 17*s.* 6*d.*

(Signed) "Harford B. &. B. Co.,
"Per E. G. Wilson."

On the 1st of January, 1874, Burrs & Co. delivered to the defendants a bill for 1612*l.* 17*s.* 6*d.* drawn by Burrs & Co. upon and accepted by Pitchford & Co., payable at three months from that day. This bill was dishonored; Burrs & Co. having stopped payment on the 14th of January, and Pitchford & Co. having petitioned the court of bankruptcy on the 16th.

On the 7th of January, 1874, the plaintiffs bought of Burrs & Co. 50 tons of sheet zinc (the goods mentioned in the declaration), to be paid for by their acceptances. On the following day Burrs & Co. sent the plaintiffs an invoice of the zinc, together with a common delivery order on the defendants, and two bills for the price, for the plaintiffs' acceptance. Conceiving this delivery order to be insufficient security for the goods, the plaintiffs declined to accept the bills without a specific undertaking from the defendants to deliver them; whereupon Burrs & Co. handed them two documents (signed by the defendants' agent) in the form set out in the second replication to the third plea, being two of four which the defendants had handed to Burrs & Co. upon the making of the original contract of sale. These documents were duly indorsed and delivered by Burrs & Co. to the plaintiffs, who thereupon accepted the bills.

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The contract between the defendants and Burrs & Co. was not for the sale of any specific zinc, but of 100 tons to be taken from a quantity which the defendants had on their wharf at the time.

In answer to a question put to them by the learned judge, the jury found that the replication was proved: and he directed a verdict to be entered for the plaintiffs on the replication to the third plea, and for the defendants on not possessed, and also on the fourth plea, giving either party leave to move.

Nov. 3, 1875. *Benjamin, Q.C.*, for the defendants, obtained a rule to set aside the verdict for the plaintiffs and to enter a verdict for the defendants on the special replication, on the ground that there was no evidence in support of the verdict; or for a new trial, on the ground that evidence was improperly received in support of the replication, notwithstanding objection by the plaintiffs to the admission of such evidence.

Nov. 6. *Hopwood, Q.C.*, for the plaintiffs, obtained a rule to set aside the verdict for the defendants on the plea of not possessed, and to enter a verdict for the plaintiffs as to that plea, or a general verdict for the plaintiffs for nominal damages and delivery of the goods, or damages 1475*l.*; or for a new trial, on the ground that the evidence shewed that the defendants were estopped from denying that the property in the 50 tons of zinc passed to and was in the plaintiffs.

Feb. 9, 11, 1876. *Hopwood, Q.C.*, and *T. De Courcy Atkins*, for the plaintiffs. (1) The plaintiffs having bought the goods of Burrs & Co. upon the faith of the defendants' undertaking to deliver them to the indorsed order of Burrs & Co., the defendants are estopped from denying that the goods, though not specifically appropriated at the time of sale, passed to Burrs & Co. by their contract of the 31st of December, 1873; for, they thereby induced the plaintiffs to alter their position to their prejudice, which brings the case within one of the rules as to estoppels in pais laid down by this Court in *Carr* v. *London and North Western Ry. Co.* (2) If these documents had been delivery orders in the ordinary form, the case would have been different. But undertakings such as

(1) The demurrer and the rules were taken together.
(2) Law Rep. 10 C. P. 307.

these, which almost amount to negotiable securities, or, at the lowest, to acknowledgments by the wharfingers that they hold the goods in trust for the vendees, could only be given for the purpose of enabling the vendees to re-sell the goods as if they were the actual and bonâ fide owners of them free from incumbrance. They constitute an absolute and unconditional contract to deliver the goods to whoever may be the indorsee.

[BRETT, J. Are the defendants estopped from saying that the plaintiffs cannot recover in this action because there is no specific zinc which has been appropriated to Burrs & Co.'s contract?]

The effect of the finding of the jury is that the defendants intended that these documents should operate as the replication alleges that they did, viz. "as a representation to all persons to whom the same should be shewn that the goods therein mentioned were the property of Burrs & Co. free from all lien or claim whatsoever on the part of the defendants;" and that the plaintiffs parted with their money upon the faith of that representation.

[BRETT, J. Does it amount to a representation that there was a specific quantity of zinc ready to be delivered? and did the plaintiffs act upon that representation?]

The jury have so found in terms. The authorities as to estoppel by acts and conduct are all reviewed in the elaborate judgment of Blackburn, J., in *Crouch* v. *Credit Foncier of England.* (1)

[BRETT, J. Your argument would treat these documents as negotiable securities, which they clearly are not.]

[The following cases were also cited:—*Woodley* v. *Coventry* (2); *Dixon* v. *Bovill* (3); *Higgs* v. *Northern Assam Tea Co.* (4); *Knights* v. *Wiffen* (5); *Goodwin* v. *Robarts* (6); *Re Agra and Masterman's Bank* (7); *Re Blakeley Ordance Co., Ex parte New Zealand Banking Corporation* (8); *Re General Estates Co., Ex parte City Bank.* (9)]

Benjamin, Q.C., and *W. G. Harrison*, contrà, were not called upon.

BRETT, J. In this case the plaintiffs sue the defendants in

(1) Law Rep. 8 Q. B. 374, 378.
(2) 2 H. & C. 164; 32 L. J. (Ex.) 185.
(3) 3 Macq. 1.
(4) Law Rep. 4 Ex. 387.
(5) Law Rep. 5 Q. B. 660.
(6) Law Rep. 10 Ex. 76, 337.
(7) Law Rep. 2 Ch. 391.
(8) Law Rep. 3 Ch. 154.
(9) Law Rep. 3 Ch. 758.

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trover and detinue for goods, which they had bought of Burrs & Co. The defendants' answer to the claim was, that they sold the goods to Burrs & Co. for a certain price, that Burrs & Co. stopped payment, and that the defendants claimed as unpaid vendors to be entitled to withhold delivery. To this the plaintiffs reply that at or immediately after the time the defendants contracted to sell the goods to Burrs & Co., they gave to Burrs & Co. two written undertakings for the delivery of the goods, in the following words,—"We hereby undertake to deliver to your order indorsed hereon twenty-five tons merchantable sheet zinc off your contract of this date;" that the defendants signed the said undertakings intending that the same should operate as a representation to all persons to whom the same should be shewn that the goods therein mentioned were the property of Burrs & Co. free from all claim or lien on the part of the defendants, that such undertakings were indorsed and delivered to the plaintiffs by Burrs & Co. when they purchased and paid for the goods, and that they the plaintiffs purchased of and paid for the goods to Burrs & Co. upon the faith of the said representation and of such undertakings; and therefore it is contended that the defendants are estopped from setting up as against the plaintiffs their right as unpaid vendors to stop the goods. It is admitted that the document in question is not a known document amongst merchants; therefore the Court must look at it as they would at any other ordinary written instrument. So looking at it, it obviously contains no representation of any fact, and the plaintiffs had no right to rely upon it as such a representation, and consequently they do not bring themselves within either of the propositions as to estoppel which I ventured to lay down in *Carr* v. *London and North Western Ry. Co.* (1), and to which I still adhere. It was a mere undertaking or contract between the plaintiffs and their immediate vendees. Upon the facts of the case, it seems to me that there was no evidence to support the plaintiffs' case, and that the verdict should be entered for the defendants. A subsidiary question remains, viz. whether the replication is good on demurrer. The only representation being that which I have described, I think the replication is bad upon the face of it. The plaintiffs' rule will therefore be discharged, and the defendants'

(1) Law Rep. 10 C. P. 307.

rule made absolute, and there will be judgment for the defendants on the demurrer.

ARCHIBALD, J. I am of the same opinion. Apart from the undertaking referred to in the replication, the defendants were clearly entitled to retain the goods, as unpaid vendors. The remaining question is simple, and the rule of law clear. The plaintiffs seek to get rid of the defendants' right to withhold delivery of the goods by reason of the documents handed to Burrs & Co. at the time of the contract. It has been insisted on their part that those documents amount to a representation that the goods were the goods of Burrs & Co. free from any lien, and that therefore the defendants are estopped from setting up the right which every unpaid vendor has of withholding delivery of the goods. I agree with my Brother Brett that we cannot look at the documents in question as amounting to any such estoppel. They clearly do not contain a representation of any fact which can be relied on as an estoppel. The question raised by the demurrer depends upon the same consideration.

LINDLEY, J. I am of the same opinion. The question is whether there is anything in the documents relied on by the plaintiffs to estop the defendants from saying that no property in the zinc passed to Burrs & Co. or their vendees, the plaintiffs, by the sale and by the indorsement to them of these delivery orders. The document amounts to no more than this,—"You have a contract with me for the sale of certain zinc; and I am willing to deliver twenty-five tons off that contract, on the terms of that contract." That clearly does not amount to a representation that Burrs & Co. were at liberty to transfer to their vendees a property in the zinc which they themselves did not possess. The document speaks for itself. The demurrer to the replication turns upon the construction of the document, and must follow the fate of the rules.

Rules and judgment accordingly.

Solicitor for plaintiffs: *E. Draper.*
Solicitor for defendants: *J. T. Davies.*

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Merchant Shipping Act, 1873 (36 & 37 *Vict. c.* 85), *ss.* 12, 13, 14, *Construction of—Detention of Ship for Unseaworthiness—Form of Order—Appeal.*

By s. 12 of the Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85), it is enacted that, where the Board of Trade have received a complaint or have reason to believe that any British ship is by reason of the defective condition of her hull, &c., or by reason of overloading, &c., *unfit to proceed to sea without serious danger to human life*, they may appoint some competent person or persons to survey her and to report to them, and may if they think fit order her to be detained for survey; and thereupon any officer of Customs may detain such ship until her release be ordered either by the Board or by any Court to which an appeal is given under s. 14 of the Act; and, upon receipt of the report of the surveyor, the Board may, if in their opinion the ship cannot proceed to sea without serious danger to human life, make such further order as they may think requisite as to the detention of the ship, or as to her release either absolutely or upon the performance of such conditions with respect to repairs, &c., as the Board may impose:—

Held, that neither the original information or complaint nor the report of the surveyor need state in terms that the vessel "cannot proceed to sea without serious danger to human life:" it is enough if the facts reported to the Board are such as ought reasonably to satisfy them that the condition of the ship is such that she is unfit to proceed to sea without serious danger to human life.

The chief officer of Customs at Hull, on the 6th of November, 1873, intimated to the Board of Trade that he had examined a ship called the *Mary Ann* (built in 1831), and was of opinion that she should be examined with the cargo out before being allowed to proceed to sea. The defendant (the assistant-secretary of the Board of Trade) on the 7th wrote to the collector of Customs at Hull, as follows:—"The Board of Trade having reason to believe that the vessel named above is unseaworthy, you are requested to detain her for the purpose of survey;" and on the same day he wrote to the owner of the *Mary Ann*, as follows,—"I am directed by the Board of Trade to inform you that they have reason to believe that the British ship *Mary Ann* is for the reasons stated unfit to proceed to sea without serious danger to human life. The Board of Trade have therefore ordered her detention by the proper authority until she can be surveyed."

The ship was surveyed on the 12th of November by two surveyors of Customs, who reported to the Board that "they had examined the vessel, and found that a thorough repair would be required to render her seaworthy, that the decks were quite worn out, the deck-beams and knees were defective, and the timbers rotten," and intimated that, as the vessel belonged to Sunderland, the owner wished to take her there for repair. This report was sent to the owner of the *Mary Ann* on the 15th of November, inclosed in a letter, in which the assistant-secretary of the Board wrote, in answer to a request of the owner to be allowed to take the vessel to Sunderland in ballast,—"I am directed by the board to state that they are prepared to allow the *Mary Ann* to be towed round to Sunderland for the necessary repairs, provided the crew, knowing the case, are willing to go

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in her. Upon hearing that the repairs indicated in the accompanying report have been effectually and completely carried out, they will direct a re-survey of the vesssel to be made," &c. On the 1st of January, 1874, the Board communicated to the plaintiff's solicitors by telegram and letter their consent to the vessel *sailing* to Sunderland upon certain conditions. Those gentlemen in reply objected to the right of the Board to make the conditions indicated, "inasmuch as your surveyors did not report that the ship was 'unfit to proceed to sea'; neither has the Board of Trade, so far as we know, made any order stating that in their opinion the ship is unfit to proceed to sea."

In reply to this letter, the assistant-secretary of the Board wrote to the solicitors on the 7th of January, 1874, a statement of the facts relating to the detention of the *Mary Ann*, concluding as follows,—"The Board of Trade now withdraw the modification of their order by which she would have been allowed to proceed to Sunderland; and, under the powers given to them by the Act, they vary their order as follows, viz. that, as in their opinion the ship cannot proceed to sea without serious danger to human life, she shall be detained at Hull for further survey and repairs."

The ship was accordingly surveyed on the 14th of January, the surveyors reporting that every portion of the hull was in a state of extreme decay; concluding their report as follows,—"From what we have seen and tested, we are of opinion that at the time of survey the ship was, having regard to the nature of the service for which she was intended, unfit to proceed to sea without serious danger to human life." A copy of this report was sent to the plaintiff's solicitors on the 16th of January, in a letter in which the assistant-secretary wrote,—"I am to state that the order made by the Board thereupon is, that the vessel be detained at Hull until repaired to the satisfaction of this Board's surveyor." Ultimately, the ship was taken possession of by a mortgagee, and sold for a small sum.

In an action brought by arrangement against the assistant-secretary of the Board of Trade for the alleged illegal detention of the ship:—

Held, that the detention was justifiable, the Board having ample grounds for believing that the ship could not proceed to sea without serious danger to human life; that the letter of the 7th of November, 1873, did not amount to an order under s. 12 of the Act; but that the letter of the 7th of January, 1874, was a valid order which could be questioned only upon appeal under s. 14 of the Act.

Sect. 14 of the Act provides that, if the owner of any ship surveyed under this Act is dissatisfied with any order of the Board made upon such survey, he may apply (in England) to any Court having Admiralty jurisdiction; and such Court may order the ship to be surveyed anew, and may make such order as to the detention or release of the ship, and as to costs and damages, as to the Court may seem just:—

Quære, whether, in the case of any excess of jurisdiction on the part of the Board, the plaintiff's common-law remedy by action was taken away by this enactment?

THIS was an action brought by the plaintiff, the owner of the ship *Mary Ann*, of Maldon, against the defendant, the assistant-

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secretary of the marine department of the Board of Trade, to recover damages for the alleged illegal detention of that vessel under color of the Merchant Shipping Act, 1873, on the ground of unseaworthiness.

The cause was tried before Brett, J., at the sittings in Middlesex after Hilary Term, 1875. The facts were as follows:—

The plaintiff was the owner of a vessel called the *Mary Ann*, of Maldon, which usually traded on the east coast of England. On the 6th of November, 1873, the chief officer of Customs at Hull, at which port the *Mary Ann* had just arrived from St. Malo with a cargo of grain, addressed the following letter to the defendant, the assistant-secretary of the Board of Trade:—

Hull, 6th November, 1873.

Mr. McKenzie having called my attention to the brigantine *Mary Ann*, of Maldon, we have examined her lights, &c., and, from the defective state of her decks, and the general appearance of the vessel, I am of opinion that she should be examined with the cargo out before being allowed to proceed to sea. She is at present loaded with grain, which she is about to discharge. From the mercantile navy list it appears that this vessel was built at Walker, Northumberland, in 1831. (Signed) John Spear.

In consequence of this communication, the defendant addressed the following instructions from the Board of Trade to the collector of Customs at Hull:—

November 7th, 1873.

Re *Mary Ann*, of Maldon.

To the collector of Customs, Hull,—

1. The Board of Trade having reason to believe that the vessel named above is unseaworthy, you are requested to detain her for the purpose of survey.

2. You will be so good as to communicate at once with the owner or master. If the vessel is about to be placed under repair at the port, this Board will consider the propriety of suspending their order for survey until such time as the repairs are completed.

3. If, however, the vessel is about to proceed to sea, the accompanying notification is to be delivered to the owner or master at once, and the accompanying instruction to the surveyor of this Board is to be forwarded to that officer without delay.

4. If, although the vessel is not about to proceed to sea, the owner or master disputes the allegation of unseaworthiness, you will be so good as to inform him that the Board will be prepared to consider any representation in the matter he may think fit to make. In this case, you will not send forward the notification and instruction pending reference to this department.

5. In any case, you will be good enough to report to the Board at once, and to return with this minute paper the accompanying notification and instruction, if not used. (Signed) Thomas Gray.

On the same day the defendant wrote to the plaintiff, as follows:—

Board of Trade, Nov. 7th, 1873.

Sir,—I am directed by the Board of Trade to inform you that they have reason to believe that the British ship named at foot hereof, now or recently lying at the place named, is for the reasons stated unfit to proceed to sea without serious danger to human life. The Board of Trade have therefore ordered her detention by the proper authority until she can be surveyed.

The Board of Trade think it right to inform you that, if any person wilfully does or causes to be done any act by which the surveyor will be prevented from or obstructed in ascertaining the condition of the ship, the offender will, under the 12th section of the Merchant Shipping Act, 1873, incur a penalty not exceeding 50*l*. I am specially to warn you against coating her with tar or any substance until the survey is completed. The collector of Customs has no power to release the ship if sold to foreigners. A copy of the surveyor's report will be sent to you on the completion of the survey.

The ship was on the 12th of November surveyed by Messrs. Stewart and M'Kenzie, surveyors of Customs, who reported to the board, as follows:—

We have the honour to report that we have examined this vessel to-day, and find that a thorough repair will be required to render her seaworthy. The decks are quite worn out, the deck-beams and knees are defective, and the timbers where we had the ceiling removed we found to be rotten.

As the vessel belongs to Sunderland, the owner wishes to take her there for repair. We see no objection to her being towed down there for the purpose.

(Signed) James Stewart.
J. M'Kenzie.

This report was received by the Board of Trade on the 13th. On the same day the plaintiff sent the defendant a telegram to this effect,—"Will you allow the *Mary Ann*, of Maldon, to proceed from Hull to Sunderland in ballast, to be repaired according to your surveyors' report?" And this was followed by a letter of the 14th, as follows:—

Queen's Dock, Hull, 14th Nov. 1873.

Sir,—I take the liberty of writing you respecting my vessel, the *Mary Ann*. The captain sent you a telegram to be allowed to proceed to Sunderland in ballast, to have the necessary repairs done as ordered by your surveyors. Being a stranger here, I cannot get the credit I require here, as I can at my place of residence, Sunderland. The ship loaded a cargo of barley at St. Malo, and has discharged it here, and had not a single bushel damaged: as such, I trust you will grant permission for her to proceed. (Signed) Thomas Lewis, Owner.

On the 15th of November, the following letter, inclosing the

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report of the survey of the *Mary Ann*, was sent to the plaintiff:—

Board of Trade, Nov. 15th, 1873.

I am directed by the Board of Trade to inclose for your information the accompanying copy of a report of the survey of the *Mary Ann*, of Maldon, and to state that they are prepared to allow her to be towed round to Sunderland for the necessary repairs, provided she starts early on a fine morning, and that the crew, knowing the case, are willing to go in her.

Upon hearing that the repairs indicated in the accompanying report have been efficiently and completely carried out, they will direct a re-survey of the vessel to be made, and will inform you of the result. All expenses will have to be paid prior to the vessel leaving Hull. (Signed) Thomas Gray.

On the 9th of December the following letter was sent by the plaintiff to the Board of Trade:—

Sunderland, 9th Dec. 1873.

Re *Mary Ann*, of Maldon.

To the assistant-secretary, Marine Department.

Sir,—Since my return from Hull, in which port the above-named ship now lies, I regret that my circumstances compel me to request of your Board to allow me to sail the ship in ballast (about sixteen or eighteen hours' sailing) from there to here, to have the repairs done in accordance with your survey. The *Mary Ann* recently had heavy repairs to her hull, a new kid, and in ballast makes no water, if any, only a few inches when in dock, and has delivered 900 qrs. of wheat without a bushel of it damaged by water, bringing it 600 miles, during the voyage (by the log-book) encountering severe gales until she reached Hull. I believe if you can or will take this into consideration, when I inform you I cannot afford to have her towed down under your restrictions as stated in yours of the 15th November, viz. "That you are prepared to allow her to be towed round to Sunderland for the necessary repairs, provided she starts early on a fine morning, and that the crew, knowing the case, are willing to go in her." Had her deck proved faulty in discharging her cargo, I think at present she would not wet a half ton of her ballast. She was built near Sunderland about 1831, and has always been in the coal trade coastways; and not a single life was lost in her till the last voyage, which was from here to St. Malo, when one of the men fell from the main yard while reefing: this was accidental, and in no way attributable to the ship. I can get a crew to proceed to Hull and bring her here in ballast, and shall be glad to make one of them myself. Indeed, three of my old captains have offered me their services gratis. (Signed) Thomas Lewis.

On the 18th, the defendant wrote to the plaintiff acknowledging the receipt of the last-mentioned letter, and adding, "In reply, I am to inform you that the Board are unable to depart from the conditions laid down in their letter of the 15th ult."

On the 29th of December the plaintiff's solicitors wrote to the Board asking them to consent to have the vessel brought to Sun-

derland without being towed; to which the defendant replied by telegram on the 1st of January, 1874,—"The Board of Trade will allow the *Mary Ann* to sail to Sunderland on certain conditions which will be sent to you by post to-night,"—and by letter of the same date, as follows:—

Gentlemen,—In reply to your letter of the 29th ult., in which you request that the *Mary Ann*, of Maldon, may be permitted to sail from Hull to Sunderland instead of being towed to the latter port, I am desired by the Board to state that this Board will accede to your request, on the condition that both master and owner sail in her, that she carries a boat fitted after the manner of a life-boat to the satisfaction of this Board's surveyor, that she proceeds direct to Sunderland, and that a bond with two sureties in the sum of 200*l.* conditioned as above be handed to the collector of customs at Sunderland before the vessel starts.

On the 2nd of January, 1874, the plaintiff's solicitors wrote to the Board of Trade, as follows:—

Sunderland, 2nd January, 1874.

Gentlemen,—We beg to acknowledge receipt of your telegram and letter of yesterday, stating that the Board of Trade will not object to this vessel sailing from Hull on certain conditions.

We do not consider that your Board have the right to make any such conditions as you name, inasmuch as your surveyors did not report that the ship was "unfit to proceed to sea;" neither has the Board of Trade, so far as we know, made any order stating that in their opinion the ship is unfit to proceed to sea (see s. 12 of the Merchant Shipping Act, 1873). At all events, they have not served a copy of any such order, unless we are to consider Mr. Gray's letter of Nov. 15th as equivalent to an order of the Board of Trade: and even that does not state what the Act requires, viz. "that, in the opinion of the Board of Trade, the ship cannot proceed to sea without serious danger to human life." If any formal order has been made under s. 12, we shall be glad to have a copy of same, that we may be able to advise our client more fully.

In your last letter you do not name the claim for expense of survey, which was named in your letter of the 15th November addressed to the owner of the ship. Are we to understand that you abandon this? Our client, of course, disputes his liability to pay any expenses; and he has a claim against the Board of Trade for compensation for detention of the ship, under the 13th section of the Act. The amount of this claim, however, cannot be ascertained as yet.

To this letter, the defendant on the 7th of January sent the following answer:—

Board of Trade, 7th January, 1874.

Gentlemen,—I am directed by the Board of Trade to acknowledge the receipt of your letter of the 2nd instant on the subject of the detention of the vessel *Mary Ann*, of Maldon.

The facts of the case are as follows:—On the 7th of November, the Board of Trade had reason to believe that the vessel *Mary Ann*, then about to discharge a cargo of grain at Hull, was, by reason of the defective condition of her hull, unfit

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to proceed to sea without serious danger to human life. The ship was therefore on that day detained for survey. The owner, her master, was served with notice of the detention and its cause by the collector of Customs at Hull on the 8th November. On the 12th of November the master asked by telegram whether the Board would allow the vessel to proceed in ballast to Sunderland to be repaired according to the report of the Board's surveyor. The Board did not at once answer this telegram, as they had not then received the report of their surveyor.

The surveyors made an inspection of the vessel on the 12th, and on the 13th the Board received their report, which was to the effect that a thorough repair would be necessary; and they added,—"as the vessel belongs to Sunderland, the owner wishes to take her there for repairs: we (the surveyors) see no objection to her being towed there for that purpose." On the 15th November the owner wrote, stating that he was a stranger at Hull, and confirming the request of the master to be allowed to remove her to Sunderland in ballast, in order that he might have the necessary repairs done as ordered by the surveyors.

On the 15th November the Board sent to the owner of the ship a copy of their surveyors' report and the order of the Board thereon; the order being that the ship "might be towed to Sunderland for the necessary repairs, provided she starts early on a fine morning, and that the crew, knowing the case, are willing to go in her." On the 15th, the Board of Trade sent detailed instructions to the collector at Hull, with a letter also to the master or owner.

On the 20th of November, the Board of Trade, wishing to save the owner the expense of keeping a man on board while the vessel was under detention, instructed the collector at Sunderland to make an offer to him. The order was as follows:—"The collector of Customs, Sunderland, is requested, on arrival of the *Mary Ann* at Sunderland to demand the ship's register, and to deposit it with the registrar-general of seamen, if the owner is desirous to avoid the expenses of detention."

On the 9th of December, the owner wrote to the Board of Trade, objecting to the conditions imposed by the order of the 15th November as to leaving Hull on a fine morning and being towed, and requested that she might be allowed to sail.

The owner did not propose to give any guarantee that she should be taken to Sunderland. Looking to the fact that already a ship which had been allowed to leave one port to be surveyed and repaired at another port had not proceeded there, but had been taken to and sold at a foreign port, and looking to the further fact that the surveyors found the decks of the *Mary Ann* were quite worn out, the deck-beams and knees were defective, and the timbers (where they the surveyors had the ceiling removed) they found to be rotten, the Board of Trade declined to modify their order of the 15th of November, and on the 12th December they informed the owner accordingly.

On the 30th of December the Board of Trade received a letter from your firm pointing out that the cost of the towing the ship to Sunderland would be 25*l*., and asking that the request of the owner to sail her to Sunderland might be complied with. Your letter, however, contained the following important statement, —"The crew of the vessel are perfectly willing to bring the vessel round to Sunderland in ballast, and both captain and owner are prepared to go in her as well."

On the 1st instant, the Board of Trade modified their order of the 15th of November as you requested; but they added to the condition you had suggested, that the master and owner should go in her, the further conditions, viz. that she carries a boat fitted after the manner of a life-boat to the satisfaction of the Board's surveyor, that she proceeds direct to Sunderland, and that a bond with two sureties in the sum of 200*l.* conditioned as above be handed to the collector of Customs at Sunderland before the vessel starts.

This order they communicated to you on the same day by telegram and letter. On this point I have to point out that conditions were first proposed by you, and not by the Board of Trade, and that this Board merely added other conditions to those you yourselves had proposed; and, as regards your allegation that the surveyors did not report that the ship was unfit to proceed to sea without serious danger to human life, I am to refer you to the report itself, which is as follows:—[See the report set out ante, p. 455.]

The Board of Trade could only accept and act on that report, which stated that the decks were quite worn out, and that where the ceiling was removed the surveyors found the timbers to be rotten, as a report shewing that the ship was unfit to proceed to sea without serious danger to human life. The Board of Trade having now given a statement of the case, and having explained how the matter stands, desire me to say in conclusion that the steps taken by them since the 15th of November have been taken with a view to assist the owner, and on the application of the owner; and the Board of Trade cannot now admit that any proposals they may have entertained with a view to facilitating the repairs of an unseaworthy ship are now to be pleaded as an excuse for releasing such ship from detention. The fact remains that the ship is detained, that a partial survey only has been held on her, and that the negotiations with the owner for removing her to Sunderland have fallen through.

The Board of Trade now withdraw the modification of their order by which she would have been allowed to proceed to Sunderland; and, under the powers given by the Act, they vary their order, as follows, viz. that, as in their opinion the ship cannot proceed to sea without serious danger to human life, she shall be detained at Hull for further survey and repairs. A shipwright surveyor will be sent from London at once to complete the survey.

(Signed) Thomas Gray.

The ship was accordingly surveyed by two shipwright surveyors, who made their report on the 14th of January, 1874, in which they described every portion of the hull to be in a state of extreme decay,—concluding as follows:—"From what we have seen and tested, we are of opinion that at the time of survey the ship was, having regard to the nature of the service for which she was intended, unfit to proceed to sea without serious danger to human life."

A copy of this report was sent to the plaintiff's solicitors on the 16th of January, in a letter in which the defendant wrote,—"I am to state that the order made by this Board thereupon is, that the

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vessel be detained at Hull until repaired to the satisfaction of this Board's surveyor."

By arrangement, instead of seeking his remedy by a petition of right, the plaintiff brought this action against the Board of Trade in the name of the assistant-secretary of the marine department of that Board, to recover damages for the alleged illegal detention of the vessel.

On the part of the plaintiff it was contended, that the detention of the *Mary Ann* upon the surveyor's report of the 12th of November, 1873, was unjustifiable, inasmuch as it was not alleged therein that she was "unfit to proceed to sea without serious danger to human life," as provided by ss. 12, 13, of the Merchant Shipping Act, 1873, 36 & 37 Vict. c. 85; that, having no power to detain the ship upon that report, the Board had no right to impose the conditions they did as to the vessel being towed or sailed to Sunderland; that the board exceeded their powers in causing the second survey to be made; and that, at all events, such second survey was not made within a reasonable time.

For the defendant it was insisted, that the report on the first survey amply justified all that was done by the board, shewing as it did that the ship was absolutely unseaworthy, which necessarily involved danger to human life; and that, at all events, the second survey and report complied with all the requirements of the Act, and shewed that the opinion which the board had formed as to the unfitness of the vessel to proceed to sea was well warranted by the result. It was further contended on the part of the defendant that the plaintiff's remedy, if any, was by appeal to a Court having Admiralty jurisdiction, under s. 14 of the Merchant Shipping Act, 1873, and not by action.

A verdict was entered for the plaintiff, subject to leave reserved to the defendant to move to enter a verdict for him; the damages to be settled by a reference subject to the direction of the Court as to the principle upon which and the period for which the plaintiff was entitled to damages, if any, for the ship's detention.

Sir John Holker, S.G., in Easter Term, 1875, obtained a rule nisi.

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Jan. 25, 1876. *Lanyon* shewed cause. The questions raised in this case turn mainly upon the construction of ss. 12, 13, and 14 of the Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85), the material provisions of which are as follows:—Sect. 12. "Where the Board of Trade have received a complaint or have reason to believe that any British ship is by reason of the defective condition of her hull, equipments, or machinery, or by reason of overloading or improper loading, unfit to proceed to sea without serious danger to human life, they may, if they think fit, appoint some competent person or persons to survey such ship, and the equipments, machinery, and cargo thereof, and to report thereon to the Board." "The Board of Trade may, if they think fit, order that any ship be detained for the purpose of being surveyed under this section; and thereupon any officer of Customs may detain such ship until her release be ordered either by the Board of Trade or by any Court to which an appeal is given under this Act." "Upon the receipt of the report of the person making any such survey, the Board may, if in their opinion the ship cannot proceed to sea without serious danger to human life, make such further order as they may think requisite as to the detention of the ship, or as to her release, either absolutely or upon the performance of such conditions with respect to the execution of repairs or alterations, or the unloading or reloading of cargo, as the Board may impose. They may also vary or add to such order." "A copy of any such order, and of the report upon which it was founded, and also of any variation of or addition to such order, shall be delivered as soon as possible to the owner or master of the ship to which it relates." Sect. 13 enacts that, "if upon the survey of a ship under this Act she is reported to have been at the time of the survey, having regard to the nature of the service for which she was then intended, unfit to proceed to sea without serious danger to human life, the expenses incurred by the Board of Trade in respect of the survey shall be paid by the owner of the ship to the Board of Trade, and shall, without prejudice to any other remedy, be recoverable by them in the same manner as salvage is recoverable. If upon such survey the ship is not reported to have been unfit to proceed to sea, having regard to the nature of the service for which she was intended, the Board of Trade shall be liable to pay compensa-

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tion to any person for any loss or damage which he may have sustained by reason of the detention of the ship for the purpose of survey, or otherwise in respect of such survey." And s. 14 provides that, "if the owner of any ship surveyed under this Act is dissatisfied with any order of the Board of Trade made upon such survey, *he may* apply to any of the following Courts having jurisdiction in the place where such ship was surveyed, that is to say" (amongst others), "In England, to any Court having Admiralty jurisdiction. The Court may, upon such application, if they think fit, appoint one or more competent persons to survey the ship anew, and any surveyor so appointed shall have all the powers of the person by whom the original survey was made. Such survey anew shall, if so required by the Board of Trade or the ship-owner, be made in the presence of any person or persons appointed by them respectively to attend at the survey. The Court to which application is made may make such order as to the detention or release of the ship, as to the payment of any costs and damages which may have been occasioned by the detention, as to the payment of the expenses of the original survey, and of the survey anew, and otherwise as to the payment of any costs of and incident to the application, as to the Court may seem just."

The sole object of this Act was the protection of human life. It was not intended to apply to a vessel that was simply in an unfit state to proceed to sea, or unseaworthy as to cargo; but only to cases where the ship is unfit to proceed to sea "without serious danger to human life." The Board in this case overstepped both the spirit and the letter of the Act by interfering with the plaintiff's ship merely because she was suspected of being unseaworthy quâ cargo. As to the first survey on the 12th of November, 1873, the Board had received no such complaint as warranted the detention of the ship. The letter of Spear, the chief officer of Customs at Hull, of the 6th of November, contained no such information. The survey thereupon made, therefore, was not made in accordance with the provisions of the Act; nor did it, even if properly held, entitle the Board to make any order for the detention of the ship, inasmuch as it contained no reference to the condition upon which alone such an order could legally be made, viz. the unfitness or inability of the ship to proceed to sea without

serious danger to human life. Then, the second survey, which took place on the 14th of January, 1874, would, it may be conceded, have justified the proceedings of the Board, had the Board been justified in making it, and had it been made within a reasonable time. But, having directed one survey and made one order, the Act did not warrant a second survey, except for the purpose of seeing that the repairs ordered on the first survey had been properly executed.

[LORD COLERIDGE, C.J. The ship, be it remembered, was forty-two years old. The description of her state in the first report by Stewart and Mackenzie clearly was such as to warrant the Board in concluding that she could not go to sea without serious danger to human life.]

The Board could only act upon evidence: they were not to indulge in conjecture or inference. Then it is said that the plaintiff's only remedy was by appeal to a Court of Admiralty under s. 14. That section, however, only gives an appeal against an order: and here, it is submitted, there was no order at all. The appeal was intended to apply where an order has been legally made, but is thought to be too harsh or not justified in its extent by the circumstances. Besides, the statute gives the summary remedy at the option of the party; and the intention was that it should be a speedy remedy, to enable the owner to proceed to sea with his vessel and earn freight. Unless the words of a statute are clear, a man's common-law right to seek his remedy for a wrong in the ordinary tribunals of the country is not taken away. The whole foundation for a proper order was wanting here. It may well be doubted whether there could be an appeal from such an order. It is not the survey that is complained of, but that which the plaintiff conceives to be an improper assumption of power by the Board.

[LORD COLERIDGE, C.J. Is not want of jurisdiction matter of appeal?]

The principle laid down in *Birmingham* (*Overseers*) v. *Shaw* (1), and acted upon in numerous subsequent cases, is, that, where the tribunal has acted beyond the limits of its jurisdiction, notwithstanding an appeal will lie on the ground of such excess, the

(1) 10 Q. B. 868.

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party aggrieved is not bound to appeal, but is at liberty to treat the act as void. That case is thus explained by Erle, C.J., in *Pedley* v. *Davis*. (1) "It was contended," he said, "that, as the plaintiff might have tried this question on appeal, he was therefore bound to appeal, and could not bring an action for a matter which was ground of appeal: and the case of *Birmingham* (*Overseers*) v. *Shaw* (2) was cited. But, in the judgment in that case, the distinction is clearly taken between cases on the one hand where there is jurisdiction to make the rate, and the party has a ground of appeal against a rate made with jurisdiction, and cases on the other hand where there was no jurisdiction to issue the distress warrant; and it is laid down that, 'if in the first instance the Court has gone beyond its jurisdiction, the act is void. The party grieved may, if he pleases, appeal, because excess of jurisdiction is as much a ground of appeal as a merely erroneous decision; and if the Court of appeal erroneously confirms the act of the Court below, it may be that the party appealing cannot object to the want of jurisdiction in any collateral proceeding: his own act may estop him personally. But he is not bound to appeal: he is at liberty to treat the act as void.'"

Then, as to the damages. The plaintiff is entitled, under the second clause of s. 13 of the Merchant Shipping Act, 1873, assuming the first survey to have been improperly made, to damages for the detention of the ship down to the time of the second survey; and, if the second survey was bad, he is entitled to damages down to the time of the vessel's seizure by the mortgagee.

[DENMAN, J. You cannot put it higher than demurrage.]

No. But the plaintiff is also entitled to recover back the 27*l.* levied for the expenses of the surveys.

Sir John Holker, *S.G.*, *Herschell*, *Q.C.*, *Aspinall*, *Q.C.*, and *Beasley*, in support of the rule. The important question is, whether this ship was properly detained; for, if she was, no action will lie. Sect. 12 of the Merchant Shipping Act, 1873, enacts in substance that, when the Board of Trade have reason to believe that any British ship is, by reason of the defective state of her

(1) 10 C. B. (N.S.) 492, 512; 30 L. J. (C.P.) 374, 379.
(2) 10 Q. B. 868.

hull, &c., unfit to proceed to sea without serious danger to human life, they may, if they think fit, order her to be detained for the purpose of being surveyed.

[LORD COLERIDGE, C.J. We are all agreed that the Board had reason to believe that the ship in question was unfit to proceed to sea without danger to human life.]

The clause goes on, "and thereupon any officer of Customs may detain such ship until her release be ordered by the Board of Trade or by any Court to which an appeal is given [s. 14] under this Act;" and, upon receipt of the report of the surveyor, the Board may, if in their opinion the ship cannot proceed to sea without serious danger to human life, make such further order as they may think requisite as to the detention of the ship, or as to her release either absolutely or upon the performance of such conditions with respect to repairs, &c., as the Board may impose. The surveys and the correspondence shew that this ship was absolutely rotten and unfit to proceed to sea, and that the plaintiff himself admitted that she was so. The document addressed to the collector of Customs at Hull on the 7th of November, 1873, though not called an order, is substantially an instruction to that officer to detain the ship for the purpose of survey; and, though the Board subsequently relaxed somewhat the stringency of their conditions, she never was released from that detention.

LORD COLERIDGE, C.J. This is an action brought by the plaintiff, the owner of a ship, against the Board of Trade, represented by the defendant, for an alleged unlawful detention of her at Hull under the circumstances hereafter detailed; and it raises for the first time an important question upon the true construction of two or three sections of the Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85).

The plaintiff was the owner of a ship called the *Mary Ann* which was usually employed in coasting voyages on the eastern coast of England. When the circumstances which give rise to the action occurred, the *Mary Ann* had just returned from St. Malo with a cargo of corn. Whilst the ship was unloading, the Board of Trade received from a surveyor of Customs at Hull a communication as to the ship which in my judgment fully justified

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them in coming to the conclusion that the ship was in such a state that she could not proceed to sea without serious danger to human life. They thereupon ordered her to be detained for the purpose of survey, as they were impowered to do by s. 12 of the Act. This order was made on the 7th of November, 1873, and was directed to the collector of Customs at Hull. So far, therefore, it is plain that the Board of Trade were acting strictly within the authority conferred upon them by the Act. The fact of the ship's detention, and its cause, were duly notified to the owner on the 7th of November, 1873, in a letter stating that she was, "for the reasons stated, unfit to proceed to sea without serious danger to human life;" and his attention was drawn to the 12th section of the Act. The vessel was surveyed by Messrs. Stewart and M'Kenzie on the 12th of November, and the result, shewing a condition of the ship that could leave no possible room for doubt that she was wholly unfit for sea, was on the following day communicated to the plaintiff. The next document is a telegram followed by a letter from the plaintiff to the Board asking that the ship may be allowed to proceed to Sunderland in ballast, "to have the necessary repairs done, as ordered by your surveyors." Then comes a letter from the defendant (acting for the Board of Trade) of the 15th of November, intimating to the plaintiff that the ship might be allowed to be towed round to Sunderland in ballast, upon certain conditions. This was followed by a long correspondence with the plaintiff's solicitors,—into which it is unnecessary to go in detail, inasmuch as we adopt the view presented by the Solicitor General that the Board had full power to order the detention of the vessel until released by them or until the order of the Court of Appeal,—as to where and under what conditions the repairs should be done which the owner admitted he must do before he could obtain permission to go to sea. On the 7th of January, 1874, the Board gave the plaintiff's solicitors a summary of their proceedings, substantially as follows,—That, on the 7th of November, 1873, having reason to believe that the *Mary Ann* was by reason of the defective state of her hull unfit to proceed to sea without serious danger to human life, they ordered her to be detained for survey; that she was surveyed on the 12th, when it was found that a thorough repair would be necessary, and the fact was communicated to the

plaintiff; that, at the plaintiff's request, the Board consented upon certain conditions to allow the vessel to be taken in ballast to Sunderland for repair; that the negotiations for this purpose having fallen through, the Board withdraw the modification of their order by which the vessel would have been allowed to go to Sunderland, and, under the powers given to them by the Act, vary their order, as follows, viz. "that, as in their opinion the ship cannot proceed to sea without serious danger to human life, she shall be detained at Hull for further survey and repairs." The ship was accordingly further surveyed on the 14th of January, 1874, by two shipwright surveyors, who came to the conclusion that at the time of survey the ship was, having regard to the nature of the service for which she was intended, "unfit to proceed to sea without serious danger to human life." This report was communicated to the plaintiff's solicitors on the same day, with an intimation that the vessel would be detained at Hull until repaired to the satisfaction of the Board's surveyor. I am of opinion that there was abundant justification for the course pursued by the Board, and that they acted strictly within the line of duty imposed upon them by the Act of Parliament. Mr. Lanyon admits that the order of the 16th of January, 1874, founded upon the survey on the 14th, would have been a valid order, to be questioned only upon appeal under s. 14, and not the subject of an action, unless the power of the Board was exhausted by the first order. The question is whether the Act of Parliament affords a defence to the Board. It imposes upon them a sacred duty. It for the first time confers upon a government department the duty of protecting human life. When the Board have received a complaint or have reason to believe that a vessel is, by reason of the defective condition of her hull, &c., unfit to proceed to sea without serious danger to human life, they are to survey her, and may detain her for that purpose. It is by no means necessary, as Mr. Lanyon has contended, that the letter of complaint or the report of the surveyor should contain those words: but it is sufficient if to any intelligent mind there is enough to convey an intimation that the ship cannot proceed to sea without serious danger to human life from the causes described. Any other construction would absolutely defeat a very wholesome provision. The fair meaning

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of the enactment is, that if, from all the circumstances reported to them, the Board shall be of opinion that the ship is in such a state of disrepair that she cannot proceed to sea without serious danger to human life, they are impowered to stop her from so proceeding. The report of the surveyors of the 12th of November, 1873, states that the decks of the *Mary Ann* are quite worn out, the deck-beams and knees defective, and all her timbers rotten; and the ship, be it remembered, was forty-two years old. Could any one doubt that the Board were well warranted in concluding from this that she could not proceed to sea without serious danger to human life? I do not forget that those words do occur in s. 13: but I say that the same reasonable construction must be applied to that section as to subs. 5 of s. 12. I therefore come to the conclusion, on this part of the section, that the Board had on the 12th of November, 1873, received a report that the ship could not proceed to sea without danger to human life.

Much argument has been addressed to us as to the effect of the letter of the 15th of November. My impression is that that was an "order" within the meaning of the statute. The ship was already under detention. The owner had been informed that a copy of the report of the surveyors would be sent to him, and he had permission to take the vessel to Sunderland to be repaired in accordance with that report. It seems to me that an answer saying that the ship might be taken to Sunderland to be repaired was inferentially an order to do the repairs at that place, provided the conditions imposed by the Board were complied with. If it were necessary, I incline to think that that letter was an order. But, at all events, the letter of the 7th of January, 1874, was undoubtedly an order. The report of the surveyors was sufficient to warrant the board in concluding that the ship could not proceed to sea without serious danger to human life; and they ordered that she should be detained at Hull until further surveyed and repaired. As at present advised,—though I confess I feel a little difficulty by reason of some words of subs. 4 of s. 12,—I do not assent to the argument of the Attorney General, that the Board had power to order an indefinite detention of the ship. But, for the reasons I have given, I think they acted in this case substantially within the scope of their authority, and that this action cannot be maintained.

DENMAN, J. I also think there should be judgment for the defendant in this case; and I base my opinion upon a very narrow ground. I think that by the letter of the 7th of January, 1874, an order was made which was a perfectly legal order, and which was the order under which the vessel in question was detained. The 12th section of the statute enacts that, where the Board of Trade have received a complaint or have reason to believe that any British ship is, by reason of the defective condition of her hull, &c., or by reason of overloading, &c., unfit to proceed to sea without serious danger to human life, they may appoint a competent person or persons to survey her and to report to the Board; and they may, if they think fit, order her to be detained for the purpose of being surveyed; and thereupon any officer of customs may detain such ship until her release be ordered either by the Board or by any Court to which an appeal is given under the Act. The section then goes on to enact in clause 5, that, upon the receipt of the report of the person making such survey, the Board may, if in their opinion the ship cannot proceed to sea without serious danger to human life, make such further order as they may think requisite as to the detention of the ship or as to her release, either absolutely or upon the performance of such conditions with respect to the execution of repairs, &c., as the Board may impose. I agree with my Lord in thinking that the letter of Spear, the chief officer of Customs at Hull, amply justified the board in believing that the *Mary Ann* was unfit to proceed to sea without serious danger to human life, and that they did honestly hold that opinion; for, on the following day, they wrote to the collector of Customs at Hull informing him that they have reason to believe the vessel to be unseaworthy, and desiring him to detain her for the purpose of survey, and to communicate with the owner or master. Then, on the 12th of November, the vessel is surveyed by Messrs. Stewart and M'Kenzie, two Customs surveyors, who reported that a thorough repair would be required to render her seaworthy, and that her decks were quite worn out, the deck-beams and knees defective, and the timbers rotten. It is said that that report was insufficient to warrant the course pursued by the board. But I think it would be putting far too narrow a construction upon that report to hold that it did not substantially mean to convey to the

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Board an intimation that in the opinion of the surveyors the vessel was unfit to proceed to sea without serious danger to human life. Having put that construction upon the report, the Board, on the 15th of November, send the plaintiff a copy of it inclosed in a letter which has been assumed to be an "order." I do not, however, think that letter of itself amounts to an order: it rather seems to contemplate that, on certain things being done, a further order shall be made. Eventually, on the 7th of January, 1874, the Board, in answer to a letter from the plaintiff's solicitors, send them a document which, after recapitulating all the facts, concludes thus,—"The Board of Trade now withdraw the modification of their order by which she (the *Mary Ann*) would have been allowed to proceed to Sunderland; and, under the powers given by the Act, they vary their order, as follows, viz. that, as in their opinion the ship cannot proceed to sea without serious danger to human life, she shall be detained at Hull for further survey and repairs. A shipwright surveyor will be sent from London at once to complete the survey." In my judgment, they had a perfect right then to make the order, which in reality was the first order upon the subject that was made. The ship is accordingly further surveyed. There is nothing in the Act to prevent such further survey: and I think the Board had a perfect right to order the detention of the ship for that purpose.

As to whether or not the plaintiff's remedy was limited to an appeal under s. 14, I do not dissent from the opinion thrown out by my Lord, though I give no opinion myself upon it.

LINDLEY, J. I concur with my Lord and my Brother Denman in thinking that the defendant is entitled to judgment. Upon the true construction of s. 12 of the Act, the Board of Trade has jurisdiction only to prevent a ship from going to sea where they have reason to believe that she cannot do so without serious danger to human life: they have nothing to do with the safety of the ship or her cargo. But with the rest of Mr. Lanyon's argument I cannot agree. The information or complaint as to the condition of the ship may come from any one, and need not contain the words "unfit to proceed to sea without serious danger to human life;" neither need the report of the person or persons appointed to

survey the ship; it is enough if it is shewn substantially that the ship is in such a state as reasonably to satisfy the Board that she cannot safely proceed to sea without serious danger to human life.. The only other question is whether the Board exceeded their power. I am unable to see that they did. I do not think the letter of the 15th of November, 1873, amounted to an order: but that of the 7th of January, 1874, clearly did. And, looking at the correspondence, I cannot see that the Board were guilty of any unreasonable delay. As to whether the plaintiff's remedy was limited to an appeal under s. 14, I give no opinion; though, if there was any excess of jurisdiction, I incline to think the common-law remedy would not be taken away.

Rule absolute.

Solicitors for plaintiff: *Oliver & Botterell.*
Solicitor for defendant: *F. J. Hamel, Solicitor for the Customs.*

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Inspection of Documents—Privileged Communications—Letters written with a View to anticipated Litigation.

The mere fact that letters are written to the plaintiff's solicitor "in confidence" and under a pledge not to disclose their contents to any one but the plaintiff and his legal advisers, affords no defence to an application for an order to inspect them. But, if they are not merely confidential communications, but are written in answer to inquiries by the plaintiff's solicitor with a view to and in contemplation of anticipated litigation, they are privileged.

Cossey v. *London, Brighton, and South Coast Ry. Co.* (Law Rep. 5 C. P. 146) and *Skinner* v. *Great Northern Ry. Co.* (Law Rep. 9 Ex. 298) followed. *Fenner* v. *London and South Eastern Ry. Co.* (Law Rep. 7 Q. B. 767) observed upon and explained.

THE plaintiffs carry on business in co-partnership in London and elsewhere as printers and wholesale stationers, and had for some years contracted to supply the Great Western Railway Company with printing and stationery required by them for the purposes of their establishments. In September, 1874, the plaintiffs delivered a tender to the company for the supply of printing and stationery, in pursuance of public advertisements inviting

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tenders for that purpose. The defendants also delivered a tender for the supply of such printing and stationery, and their tender was accepted by the company.

The plaintiffs having reason to believe that the tenders had been tampered with by the defendants and some persons in the employ of the company, brought an action against the defendants; and in their statement of claim they alleged that the defendants and two other persons therein mentioned unlawfully and maliciously confederated and agreed together to prevent the company from continuing to contract with the plaintiffs, and to induce them to contract with the defendants, and in pursuance of such confederacy and agreement they alleged that, after both the plaintiffs and the defendants had sent in tenders, the defendants and the other persons mentioned induced a servant of the company to allow the defendants to inspect the said tenders, and that the defendants in a certain room therein described, at the office of the company, improperly opened the tender of the plaintiffs, and inspected the prices therein set forth; that the defendants then altered some of the prices in their tender to prices lower than those in the plaintiffs' tender; and that by reason of what had so occurred the company were induced to enter into a contract with the defendants and to refuse to enter into a contract with the plaintiffs.

The defendants appeared separately and delivered separate statements of defence.

An order for discovery was obtained by the defendant Bell, in obedience to which the plaintiffs made the usual affidavit that they had in their possession or power the documents relating to the matters in question in this action set forth in the first and second parts of the schedule thereto, consisting chiefly of letters and copies of letters. The second paragraph of this affidavit was as follows:—

> We object to produce the documents in the second part of the said schedule, on the ground that such letters as were written and sent by ourselves or one of us, or by James Wighton, the manager of our business in Southwark, and David Davidson, the accountant in our business at Newton-le-Willows, Lancashire, to Messrs. Baker & Nairne or Mr. Percival A. Nairne, were written to the said Messrs. Baker & Nairne or the said P. A. Nairne as solicitors for us or for one of us in this action or in the matters to which such letters refer, and that

such of the letters as are therein mentioned as having been sent by Baker & Nairne to us or either of us were written and sent by Baker & Nairne as our solicitors, and that such of the said letters as are mentioned to have been written and sent by Mr. Nelson, the solicitor to the Great Western Railway Company, to our said solicitors, were written and sent by the said Mr. Nelson for the confidential and private information of our said solicitors, and were accordingly so marked by the said Mr. Nelson (as we are informed and believe) previously to their having been received by our said solicitors; and for the reasons aforesaid we object to produce the above-mentioned documents mentioned and set forth in the second part of the said schedule.

Application was made, on behalf of the defendant Bell, to Archibald, J., at Chambers, for an order to inspect the documents in question; and the learned judge, without expressing any opinion, referred the matter to the Court. Notice of motion having been given, the plaintiffs' attorney filed an affidavit in answer, the material parts of which were as follows:—

4. In or about the month of February, 1875, I was consulted by the plaintiffs upon certain information which had reached them with regard to the manner in which they had been deprived of the contract and the defendants had obtained it. I was instructed to conduct, on behalf of the plaintiffs, certain inquiries to ascertain the truth or falseness of that information, and to enable the plaintiffs to commence such proceedings as they might be advised, if the information should turn out to be true.

5. The information which the plaintiffs had received with regard to their said tender was to the effect that, after their said tender had been delivered to the railway company and before it and the other tenders sent in by other persons had been considered and accepted or rejected, the defendants who had also delivered a similar tender to the company, and certain other persons acting in concert with them, had in an improper manner obtained access thereto for the purpose of comparing the prices set out in the plaintiffs' tender with those set forth in their own tender, and with the knowledge by that means obtained, and by altering the prices set out in the defendants' tender so as to make their prices lower than the prices set out in the plaintiffs' tender, the defendants obtained the said contract.

6. By the instructions of the plaintiffs, I called upon Mr. Nelson, the solicitor of the Great Western Railway Company, and informed him of the statements which had been made to the plaintiffs and to me as their solicitor. The statements implicated certain servants of the Great Western Railway Company as well as the defendants, who were then the company's contractors. I requested Mr. Nelson to make such an investigation of the circumstances as he might be able, and to let me know the result. This he agreed to do, on the stipulation that all communications from him to me would come from him to me as the solicitor of the plaintiffs, and would be for the confidential use of the plaintiffs and of myself on their behalf. He expressly stipulated that the information which he might give me should not be made public or communicated to any person other than the plaintiffs and their legal advisers. On this understanding the letters referred

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to in the defendant Bell's notice of motion in this action passed between the said Mr. Nelson and myself. Most of the said letters were marked "private," and all of them were written and received on the express understanding that their contents should not be made known to any one but the plaintiffs and their legal advisers.

7. My object and the object of the plaintiffs in making these communications to and inquiries from Mr. Nelson was, to ascertain the exact circumstances under which the defendants had succeeded in obtaining the contract of the Great Western Railway Company, with a view to the institution of proceedings against the defendants. This action is the result of those inquiries and communications and of the information thus obtained.

Jan. 28. *Francis* moved accordingly on behalf of the defendant Bell. The suggestion that the documents sought to be inspected are private and confidential communications, and that the writer objects to their production, affords no ground for declining to grant inspection: *Goodall* v. *Little* (1); *Richardson* v. *Hastings* (2); *Hopkinson* v. *Lord Burghley*. (3)

[Brett, J. Letters written in answer to inquiries made with reference to litigation pending or anticipated, seem to be privileged: see *Woolley* v. *North London Ry. Co.* (4); *Cossey* v. *London, Brighton, and South Coast Ry. Co.* (5)]

In *Fenner* v. *London and South Eastern Ry. Co.* (6), which was decided since *Cossey* v. *London, Brighton, and South Coast Ry. Co.* (5), Blackburn, J., lays down the rule thus:—"The principle to be derived from all the cases is, that, where it appears that the documents are substantially rough notes for the case to be laid before the legal adviser, or to supply the proof to be inserted in the brief, the discretion of the Court should, as a general rule, be to refuse the application. Where the documents fall short of that, it should as a general rule be granted."

[Denman, J. The sixth and seventh paragraphs of the affidavit of the plaintiffs' solicitor brings this case expressly within *Cossey* v. *London, Brighton, and South Coast Ry. Co.* (5)

Lindley, J., referred to *Ross* v. *Gibbs*. (7)]

In *Cossey* v. *London, Brighton, and South Coast Ry. Co.* (5), the

(1) 1 Sim. N. S. 155; 20 L. J. (Ch.) 132.
(2) 7 Beav. 354; 13 L. J. (Ch.) 416.
(3) Law Rep. 2 Ch. 447.
(4) Law Rep. 4 C. P. 602.
(5) Law Rep. 5 C. P. 146.
(6) Law Rep. 7 Q. B. 767, 771.
(7) Law Rep. 8 Eq. 522.

object of the application was to get at the opponents' case. Here, it is to obtain the means of establishing our own case.

English Harrison, contrà. In *Skinner* v. *Great Northern Ry. Co.* (1) the Court of Exchequer declined to follow *Fenner* v. *London and South Eastern Ry. Co.* (2), and adopted the rule of this Court in *Cossey* v. *London, Brighton, and South Coast Ry. Co.* (3) as being in accordance with the practice of their own Court. In *Ross* v. *Gibbs* (4), Sir John Stuart, V.C., says:—"Communications with a professional or even an unprofessional agent in anticipation of the litigation, and with a view to prosecution of a claim, or a defence against a claim, to the matter in dispute, being confidential, are privileged. Communications of plaintiffs and defendants with their own professional advisers as to their own rights or title to the subject-matter of the suit, though made before the suit, or before it was anticipated, are privileged." In *Simpson* v. *Brown* (5), the plaintiff had in her possession or power letters which had passed between her solicitor and a third person referring to the subject-matter in dispute, some of which had been written in anticipation of and the rest pending the proceedings in the suit; and it was held that she was not bound to produce them. The Master of the Rolls there says:—"I think that in all cases in which a solicitor writes letters for the purposes of the suit, and solely for the purpose of properly conducting it on behalf of his client, and obtains answers in reply, his client is not bound to produce them. He must necessarily, in the performance of his duties, make certain inquiries, and he is entitled to write to any person for that purpose, and is not bound, at the instance of the other side, to produce either his own letters or the answers to them." That is directly in point. In *Goodall* v. *Little* (6), the letters were written by a stranger to the party. Here, the letters were written and the answers received for the very purpose of establishing the plaintiffs' case in a litigation which was about to commence.

BRETT, J. This is an application on the part of the defendant

(1) 9 Ex. 298.
(2) Law Rep. 7 Q. B. 767.
(3) Law Rep. 5 C. P. 146.
(4) Law Rep. 8 Eq. 522, 524.
(5) 33 Beav. 482.
(6) 1 Sim. N. S. 155; 20 L. J. (Ch.) 132.

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Bell, not for discovery, but for the inspection of certain documents. The plaintiffs object to produce them, on the ground that they are communications between the plaintiffs or their solicitors and either the solicitor or the secretary of the Great Western Railway Company,—communications with a third party,—with a view to the institution of proceedings against the defendants, and that the present action is the result of those communications. I am of opinion that, in the exercise of the discretion of a judge at chambers and of the Court, following the rule by which that discretion has usually been guided, no order for the production and inspection of these documents ought to be made. I do not think inspection ought to be refused on the ground that the documents in question were written privately and confidentially, even though the person writing them stipulates that they shall be considered as private and confidential, and refuses to authorize their production. I do not think that is any ground of privilege. Neither do I think they can be withheld on the ground that they are answers to inquiries made by the plaintiffs or their solicitors of a third person, and that they have reference to the subject-matter of the present litigation. But I think the plaintiffs ought not to be called upon to produce them, because they were questions asked and answers given with a view to anticipated litigation, and for the purpose of enabling the plaintiffs to carry on such litigation successfully. There is no case that I am aware of which contradicts that rule; it was so laid down by this Court in *Cossey* v. *London, Brighton, and South Coast Ry. Co.* (1), which was adopted by the Court of Exchequer in *Skinner* v. *Great Northern Ry. Co.* (2) The same rule seems to have been previously adopted in the Court of Chancery in *Ross* v. *Gibbs.* (3) It is said that the case of *Fenner* v. *London and South Eastern Ry. Co.* (4) is at variance with those decisions. I should be sorry if I thought that was so; but, considering the way in which the point was taken in the argument and dealt with by the Court there, I do not think that case is at all at variance with *Cossey* v. *London, Brighton, and South Coast Ry. Co.* (1), or with *Skinner* v. *Great Northern Ry. Co.* (2)

(1) Law Rep. 5 C. P. 146.
(2) Law Rep. 9 Ex. 298.
(3) Law Rep. 8 Eq. 522.
(4) Law Rep. 7 Q. B. 767.

The point which seems to me to have been really decided in *Fenner* v. *London and South Eastern Ry. Co.* (1), is that stated by Blackburn, J., in his judgment. "I thought," he says (2), "that the documents specified in the schedule were obviously relevant to the question in dispute, and therefore fell within the general rule, and that the only question was whether they fell within any exception." Then he states what he was forced to decide there: "Mr. Willis," he says, "contended broadly that, as they were answers to questions put by the defendants after litigation was impending, they were necessarily privileged; and, if I had thought that there was any such general rule, I should have refused to make the order." Mr. Willis, therefore, for very good reasons, declined to argue the point now before us, viz. whether the communications were made with a view to anticipated litigation or for the purpose of enabling the defendants to carry on or to guide them in the manner of carrying on the litigation. He practically argued that, even though not made with that object, they were entitled to privilege, because they were questions put after the commencement of litigation. The learned judge then goes on: "It occurred to me that there might be a distinction between the earlier documents and the later ones; for, I thought it almost certain from the materials before me that the first letter from the manager in town to the local officer would be something to this effect, 'We have a complaint as to the delay in delivering cattle at your station; report to us the circumstances;' and I thought the report sent in answer to such an inquiry would not be privileged." There he puts a case where no litigation is pending or anticipated, and he seems to think the answers in that case would not be privileged. He goes on,—"But I thought it also possible that some of the later letters might be something to this effect, 'It seems probable that, if we resist this claim, much will depend on the evidence of some particular person as to some particular fact, please to learn from him what his evidence will be, and communicate to us the result.'" There he puts the case of anticipated litigation, and of questions asked with a view to guide the party inquiring as to whether he shall resist the claim or not: and he says: "And, if such had been the fact, I should,

(1) Law Rep. 7 Q. B. 767. (2) Law Rep. 7 Q. B. at p. 769.

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in the exercise of the discretion which I think is vested in a judge, have refrained from ordering the inspection of the answer to that letter, without determining whether I had power to order it or not. Having this in my mind, I asked Mr. Willis whether he made any distinction between the documents. He made none; stating that he relied on a principle, which his clients thought of great importance, stated in the last paragragh of Noden's affidavit. (1) Being of opinion that there was no such principle, I made the order to inspect all the documents except the report to the defendants' solicitors." That seems to me to be no departure from the rule laid down by this Court in *Cossey* v. *London, Brighton, and South Coast Ry. Co.* (2) I find that the same learned judge, in a case of *Malden* v. *Great Northern Ry. Co.* (3) says: "If it appears that there is a letter from the attorney in a cause to a man who may very probably be called as a witness at the trial, that letter being written after the litigation had commenced (which is the case with all these letters), is it not primâ facie a privileged communication, unless you shew some reason to the contrary?" And Quain, J., says: "Confidential communications are not necessarily privileged; but, if they are made, not only as confidential communications, but with a view to or in contemplation of a litigation, they are privileged." That is the doctrine upon which *Cossey* v. *London, Brighton, and South Coast Ry. Co.* (2) and *Skinner* v. *Great Northern Ry. Co.* (4) are founded. In commencing his judgment in *Malden* v. *Great Northern Ry. Co.* (5), Blackburn, J., says: "We adhere to the principles laid down in *Fenner* v. *London and South Eastern Ry. Co.*" (6) As I understand that case, and the principles there laid down in answer to the only argument which was urged on the part of the defendants, I also adhere to *Fenner* v. *London and South Eastern Ry. Co.* (6), inasmuch as I do not think that decision and those

(1) Which was as follows:—"I object to produce or allow inspection of any of the foregoing documents, writings, or letters, on the ground that they were not written or made in the ordinary course of the duty of the person or persons writing or making them, but were made confidentially for the purpose of or with a view to litigation and resisting the plaintiff's claim."

(2) Law Rep. 5 C. P. 146.

(3) Law Rep. 9 Ex. 300.

(4) Law Rep. 9 Ex. 298.

(5) Law Rep. 9 Ex., at p. 301.

(6) Law Rep. 7 Q. B. 767.

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principles are at all at variance with *Cossey* v. *London, Brighton, and South Coast Ry. Co.* (1) and *Skinner* v. *Great Northern Ry. Co.* (2) With respect to documents which are brought into being with a view to the conduct of litigation either already commenced or anticipated, I conceive the doctrine of all the Courts to be of accord. I therefore think that, although the sixth paragraph of the affidavit of the plaintiffs' solicitor would not by itself have brought these documents within the rule of privilege I have above stated, yet, taking that and the seventh paragraph together, I think the case is brought within the rule, and therefore that no order for inspection should be made.

DENMAN, J. I am of the same opinion. This is an application for the production and inspection of documents in the possession of the plaintiffs. The affidavit in opposition to the rule states two objections to the production of these documents,—first, that they are documents which passed confidentially between the solicitor of the Great Western Railway Company and the solicitors of the plaintiffs, and were received by the latter on the express understanding that they were to be considered as private and confidential communications. As regards that objection, however, the cases cited by Mr. Francis shew it to be no ground for withholding inspection. But there is another objection which is clearly indicated in the affidavit produced before us to-day, which seems to me to afford an answer to the application, viz. that these were communications made with reference to and in contemplation of the litigation now in progress, and passing confidentially between the plaintiffs or their solicitors and the solicitor or secretary of the Great Western Railway Company, and that the letters passing between the parties were for the purpose of getting up the case of the plaintiffs. Now, there is no contradiction of that statement, and nothing so unnatural or improbable in it as to induce us to doubt the truth of it. It is just the sort of communication which would naturally take place between the plaintiffs' solicitors in getting up the case and the solicitor or other officer of the company, who were interested in the matter to be investigated. That being so, it appears to me that this case comes clearly within

(1) Law Rep. 5 C. P. 146. (2) Law Rep. 9 Ex. 298.

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Cossey v. *London, Brighton, and South Coast Ry. Co.* (1), which was approved of and acted upon in *Skinner* v. *Great Northern Ry. Co.* (2) It is said that *Fenner* v. *London and South Eastern Ry. Co.* (3) is at variance with those decisions. But I see no difficulty in reconciling them. The utmost extent to which the case in the Queen's Bench goes is, that, though in certain cases there may be power in the Court or a judge to order inspection of communications which have in a certain sense passed between the plaintiffs' solicitors and others in contemplation of anticipated litigation, yet that case does not touch the doctrine laid down in *Cossey* v. *London, Brighton, and South Coast Ry. Co.* (1), that as a rule the Courts will not allow inspection of this sort to be made unless a very strong affirmative case is made out for the exercise of their discretion. Upon that ground, *Fenner* v. *London and South Eastern Ry. Co.* (3) may be supported. But, even if I thought the rule laid down in this Court and in the Exchequer to be too strict and rigid, still I should say that there is no ground here for holding that it would be a proper exercise of discretion to grant the inspection prayed.

LINDLEY, J. I am of the same opinion. These documents are admitted to be documents which relate to the subject-matter of the suit; primâ facie, therefore, the defendants are entitled to have inspection of them, and the plaintiffs are bound to shew reasons why they should not be produced. Now, the first affidavit filed on the part of the plaintiffs assigns as the only reason for declining to produce them, "that they were written and sent by Nelson for the confidential and private information of our solicitors, and were accordingly so marked by Nelson." That is clearly not sufficient to protect them. That has been decided. But the second affidavit puts these documents in an entirely different position. The real state of things appears to be this,—The plaintiffs' solicitors set about obtaining information for the purpose of an impending litigation between them and the defendants; and in the course of so doing they apply to Mr. Nelson, the solicitor for the Great Western Railway Company, and to others, to see what evidence

(1) Law Rep. 5 C. P. 146. (2) Law Rep. 9 Ex. 298.
(3) Law Rep. 7 Q. B. 767.

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they could obtain. It is the same as if the solicitors had employed their own clerks to obtain the information, and had received letters from them detailing the results of their inquiries. I know of no principle upon which the inspection of documents so acquired could be allowed. I apprehend it to be well established both at law and in equity that documents obtained by a party or his solicitor with a view to and in contemplation of litigation, either pending or anticipated, are protected, even though received from persons unconnected with the litigation. Amongst the authorities which support that position are *Cossey* v. *London, Brighton, and South Coast Ry. Co.* (1) and *Skinner* v. *Great Northern Ry. Co.* (2), and I know of none that is expressly opposed to it. *Fenner* v. *London and South Eastern Ry. Co.* (3) has been relied on as a decision the other way. But that case has been sufficiently distinguished by the remarks of my Brother Brett. There was nothing in it to shew that the documents of which inspection was sought there were documents which had been obtained for the purpose of litigation either pending or anticipated. As to *Goodall* v. *Little* (4), that was a case in which two defendants had been writing letters to each other, and the plaintiff asked to see them. No ground for privilege was disclosed there. I must confess that this case appears to me to be a very plain one.

Rule refused.

Solicitors for plaintiffs: *Baker & Nairne.*
Solicitors for Bell: *Courtenay & Crocme.*

(1) Law Rep. 5 C. P. 146.
(2) Law Rep. 9 Ex. 298.
(3) Law Rep. 7 Q. B. 767.
(4) 1 Sim. (N.S.) 155; 20 L. J. (Ch.) 132.

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Feb. 17.

[IN THE COURT OF APPEAL.]

GOSLIN *v.* THE AGRICULTURAL HALL COMPANY (LIMITED).

Master and Servant—Sub-contractor—Conversion—Privity of Contract.

By agreement between the Smithfield Club and the defendants, who were proprietors of a building and premises at Islington called the Agricultural Hall, the club were to have the exclusive use of the Hall during the period of their annual show of stock, &c., the defendants providing and paying a sufficient staff (who were to be under the sole control of the secretary and stewards of the club), to receive, take care of, and re-deliver the stock, &c., exhibited, and also paying the club 1000*l.*; in consideration of which the defendants were to receive certain fees or admission money from the visitors. The stock and articles to be exhibited were received at the gate of the defendants' premises by one Sharman (upon orders signed by the secretary of the Smithfield Club), who contracted with the defendants for a lump sum, amongst other things, to receive them and to re-deliver them at the end of the show upon like orders; the defendants in no way interfering. One Stilgoe, who exhibited a pen of three sheep at the show in 1873, sold them to the plaintiff; and upon the plaintiff's drover producing an order for their removal signed by Stilgoe, Sharman or one of his men delivered him by mistake sheep from another pen. These the plaintiff rejected, and he brought this action against the defendants for converting his sheep:—

Held, by Grove and Archibald, JJ.,—Lord Coleridge, C.J., doubting,—that the defendants were not responsible under the circumstances for the acts or defaults of Sharman or his men.

Affirmed on appeal,—the Court of Appeal holding that, as between the plaintiff and the defendants, there was no privity of contract, and no duty on the part of the latter to re-deliver the stock, &c., at the close of the show.

Action for the conversion by the defendants of three sheep belonging to the plaintiff. Pleas, not guilty and not possessed.

The cause was tried before Lord Coleridge, C.J., at the sittings in London after Michaelmas Term, 1874. The general outline of facts was as follows:—

The Smithfield Club, a body of farmers and others interested in agriculture, had for some years in December held an exhibition of fat cattle, sheep, and pigs, and also of implements of husbandry, roots, seeds, and other things connected with agriculture. In 1860 the club, being desirous of obtaining a more commodious place than they had theretofore had for their annual show, entered into an agreement with the defendants, a company registered pursuant to the Joint Stock Companies Acts, 1856 and 1857, and called

The Agricultural Hall Company, Limited, for the use of their hall at Islington for that purpose for a term of twenty-one years. The material parts of this agreement, which was dated the 13th of December, 1860, were as follows:—

It is hereby expressly agreed and declared that the said buildings and premises shall be placed at the entire and sole disposal of the trustees and stewards for the time being of the said club during the before-mentioned periods of time for the purposes aforesaid, and for the exhibition of all such animals and of all such implements of husbandry, seeds, roots, and other things appropriate and having reference to agriculture or husbandry, as the secretary for the time being of the said club shall certify and shall include in a list to be prepared by him, to be called a "Gate List," and to be furnished, if required, to the said Agricultural Hall Company on the respective days of admission. And it is hereby declared and agreed that the standing places of the respective persons so exhibiting shall be regulated by the secretary or the stewards for the time being of the said club or any one or more of them, and that the said Agricultural Hall Company shall at their own expense provide a sufficient number of good hurdles and of such form and dimensions as shall be required by such secretary or stewards as aforesaid, for penning the sheep and pigs, and shall provide and put up suitable posts, rails, and fastenings for the cattle, and shall also provide ready and fit for use all other requisite accommodation for the same, with a sufficient quantity of placard boards whereon the particulars and description of the stock exhibited or proposed to be exhibited may be affixed. And the said Agricultural Hall Company at their own expense shall furnish and provide a sufficient number of able bodied men for unloading, loading, and arranging the implements, seeds, roots, and other articles and things, and in addition thereto shall pay six men, or more if certified by the secretary for the time being to be necessary, who are to be selected by the secretary or stewards of the said club for the time being, to unload, load, and feed the animals in the yard, the same men respectively to be entirely under the direction of the secretary or stewards of the club for the time being; and shall also provide a sufficient quantity of hay and straw, with such a supply of good and proper water as may be requisite for all animals duly certified and placed by the secretary for the time being on the said list called the "Gate List," and for all such materials as shall arrive at the show-yard on the said premises on and after the Friday next preceding the day of public exhibition in each of the several twenty-one years aforesaid; and that the said Agricultural Hall Company shall not nor will require or be entitled to receive any allowance or charge in respect of the hay, straw, or attendance to be provided by them; and, moreover, that they will, during the continuance of the respective exhibitions, procure and employ a sufficient number of duly qualified persons constantly during the nights to watch and guard the animals and other things therein exhibited or intended to be exhibited. Provided always and it is hereby expressly agreed that the said Agricultural Hall Company shall not be bound to procure such hay, straw, and attendance for any longer period than from the Friday next preceding until the Monday next following the first day of public exhibition in each of the said twenty-one years, such being the respective days in such years within which the animals to be exhibited are to arrive at and depart

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from the said premises; and that for all live stock that shall be entered on the said "Gate List," and also for all animals, whether included in such list or not, as shall arrive before or stay after the respective days above mentioned, the said Agricultural Hall Company shall be at liberty to make a reasonable charge to the exhibitors thereof; and that the said Agricultural Hall Company will, upon the first day of public exhibition in the year 1862 and in each of the next succeeding twenty years, pay into the hands of B. T. B. Gibbs, or other the secretary for the time being of the said club, or such other person or persons as the trustees for the time being of the said club shall authorize to receive the same, the sum of 1000*l.* sterling for the right and privilege of receiving for their own use and benefit the admission or gate-money of 1*s.* for each person entering to view the animals and things exhibited, which admission or gate-money of 1*s.* and no more for each such person it is hereby agreed the said Agricultural Hall Company shall be at liberty to charge on the four days of public exhibition which shall be appointed for the year 1862 and each of the then next succeeding twenty years, but so that it shall be lawful for the said Agricultural Hall Company with the consent of the said club, to be given at a general meeting, to vary the said rate of charge on any or either of the said days; and that no money shall be taken in the buildings and premises during these respective days for private exhibitions of any sort; and that the said Agricultural Hall Company will previous to and on the said days of exhibition freely admit the officers of the club, the exhibitors of animals and things and their respective servants in actual attendance, and also the members of the said club, and the reporters or representatives of the public press upon their producing a ticket authorizing their admission signed by the secretary for the time being of the said club, without taking any admission money from any of them; and that the said Agricultural Hall Company will not permit or suffer any public exhibition whatever to be made on any Sunday which may intervene between the days of the arrival and departure in the several years to which these presents are intended to apply, or any of the animals and things which on such intervening Sundays may be on the said premises or any part thereof; and that no animal, article, or thing shall be removed from the said premises on any such intervening Sunday, except for the absolute necessity of such removal arising from illness or fire; and that the secretary or stewards for the time being of the said club shall have the entire and exclusive management and control of the business relating to the said exhibitions during the whole of the respective periods when the same shall be going on.

In furtherance of this agreement, the defendants contracted with one Sharman for putting up the necessary fittings for the exhibition and for the reception and re-delivery of the cattle and implements; and men were employed under him for the general purposes of the show. Sharman, who was called as a witness, on his examination in chief deposed in substance as follows:—"The Agricultural Hall Company pay me. I went into their service some years ago: I remain so still. I am gate-keeper. I attend to delivery orders when they are brought to me. My duty is, to

point out the pens in which the sheep and pigs are placed." On cross-examination he said: "I am a builder and contractor. I am also gate-keeper. I make four tenders every year,—one for receiving and delivering the implements, &c., one for sweeping and carting away the litter, one for putting up the fittings, and one for receiving and delivering the cattle, sheep, and pigs. In 1873 my tenders were accepted. I am paid a lump sum in respect of each tender. I send the tenders to the Hall Company. I take my instructions from the stewards of the Smithfield Club. The defendants do not interfere with me in the discharge of my duties. The owners of the animals admitted have to bring with them an admission order signed by the secretary of the club. I employ a number of men to carry into effect my various contracts. I pay them. The Agricultural Hall Company has no authority over me and my men."

The secretary of the Smithfield Club produced the printed regulations and conditions for the show, a copy of which, it was proved, was delivered to each exhibitor. Amongst these conditions were the following:—

1. No charge will be made for hay and straw for any stock, by whomsoever exhibited, if the proper certificates have been lodged in time at the honorary secretary's office, except before Thursday the 4th and after dark on Saturday the 13th of December.

4. Every animal shewn for a prize in a class, or a medal in extra stock, must have been in the possession of the exhibitor at least six months previous to the show, excepting pigs not exceeding nine months old, which can only be exhibited by the breeder.

40. The blank printed form of "delivery order" furnished by the secretary must be signed by the exhibitor or his agent, and must be given up at the yard by the person coming to take the stock away after the close of the show. The club will not in any case, or under any circumstances, hold itself responsible for any loss, damage, or mis-delivery of live stock or any article exhibited at the club's show.

The Smithfield Club in 1873 held their annual show in the Agricultural Hall on Monday the 8th of December and four following days. At that show one Zachariah Stilgoe exhibited a pen of three sheep, in pen No. 261, in class 39. During the show, viz. on the 11th of December, the plaintiff, a butcher in London, became the purchaser of the sheep for 19*l.* 10*s.*, and on payment

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of the price he received a delivery order, duly signed by the exhibitor, in a printed form provided by the club, as follows:—

Delivery Order. To remove 3 sheep after the show.
No. 261.
To the gate-keeper of the yard.
Deliver to Mr. Goslin or bearer the pen of 3 sheep exhibited by me in class 39, in the Smithfield Club Show, 1873.

Z. S. Stilgoe, Exhibitor.

Upon this order being presented at the gate of the show yard, a different pen of sheep from those he bought were by mistake delivered to the plaintiff's drover; those in pen No. 261 having been by mistake delivered out to another butcher. The plaintiff rejected them.

All the arrangements with intending exhibitors were made between them and the secretary or stewards of the Smithfield Club, the defendants never in any way interfering with them. There was no evidence to shew how the mis-delivery of the sheep in question took place; but it was assumed that it amounted to a conversion on the part of the defendants, provided they were responsible for the acts of Sharman.

His Lordship directed a verdict for the plaintiff for the sum claimed, reserving leave to move to enter a verdict for the defendants if the Court should be of opinion that under the circumstances they were not liable for Sharman's acts.

Day, Q.C., in Hilary Term, 1875, obtained a rule nisi.

Jan. 13, 1876. *Prentice, Q.C.*, and *Candy*, shewed cause. They contended that, whether Sharman was the servant of the Agricultural Hall Company or a contractor only, the sheep in question having been received upon their premises with their consent, they were bound to re-deliver them, and were responsible for the negligent acts of the persons employed by them to perform that duty, —relying upon the principle enunciated by Williams, J., in *Pickard* v. *Smith* (1), and adopted by Blackburn, J., in delivering judgment in the House of Lords in *Mersey Docks Trustees* v. *Gibbs* (2),—"'Unquestionably no one can be made liable for any act

(1) 10 C. B. (N.S.) 470, 480. (2) Law Rep. 1 H. L. 93, 114.

or breach of duty, unless it be traceable to himself or his servant or servants in the course of his or their employment. Consequently, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable. That rule, however, is inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor, by a parity of reasoning, to cases in which the contractor is intrusted with the performance of a duty incumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned. If the performance of this duty be omitted, the fact of his having intrusted it to a person who also neglected it, furnishes no excuse either in good sense or law.'"

[The following authorities were also relied on:—*Sadler* v. *Henlock* (1), *Gallagher* v. *Piper* (2), *Dalyell* v. *Tyrer* (3), *Murray* v. *Currie* (4), and the judgment of Parke, B., in *Quarman* v. *Burnett*. (5)]

Day, *Q.C.*, *Grantham*, and *Wheeler*, in support of the rule, contended that, Sharman being an independent contractor for (amongst other things) the performance of the services connected with the reception and re-delivery of the stock, &c., on behalf of the Smithfield Club, the defendants were not responsible for his acts or omissions; that, even if Sharman were the servant of the defendants, yet, inasmuch as he was acting entirely under the orders and subject only to the control of the secretary and stewards of the Smithfield Club, the ordinary rules as to the liability of a master for the acts of his servants could not apply; that the exhibition was the exhibition of the Smithfield Club, and not of the defendants; and that all the dealings and all the documents relating to the show were conducted with and emanated from the secretary of the club, the defendants merely letting their premises and their servants and workmen to the club for the purpose of carrying out the contract which they had entered into with the club.

[They cited the following authorities:—*Reedie* v. *London and*

(1) 4 E. & B. 570; 24 L. J. (Q.B.) 138.

(2) 16 C. B. (N.S.) 669; 33 L. J. (C.P.) 329.

(3) 8 E. B. & E. 899; 28 L. J. (Q.B.) 52.

(4) Law Rep. 6 C. P. 24.

(5) 6 M. & W. 499.

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North Western Ry. Co. (1), *Knight* v. *Fox* (2), *Milligan* v. *Wedge* (3), *Overton* v. *Freeman* (4), *Murphy* v. *Caralli* (5), *McCawley* v. *Furness Ry. Co.* (6), and *Hall* v. *North Eastern Ry. Co.* (7)

GROVE, J. I am of opinion that this rule should be made absolute. The case was that of a person who had an order from an exhibitor to receive certain sheep which had been exhibited in a building called the Agricultural Hall, which was fitted up suitably for the reception of animals at an annual show, but which does not appear to have been confined exclusively to that purpose, but to have been used at other times for any purposes to which the proprietors chose to devote it. The show in question was the annual show of the Smithfield Club, who were paid by the proprietors of the Agricultural Hall 1000*l.* for such exhibition. The agreement under which the hall was so used, as I construe it, bound the proprietors to provide certain servants (six of whom were to be selected by the Smithfield Club) to manage the show. A man named Sharman acted as the chief amongst these officials; and the case turns mainly, if not entirely, in my opinion, upon the evidence given by that person, and upon certain documents which were put in at the trial. Now, Sharman's evidence was to this effect,—"The Agricultural Hall Company pay me. I went into their service some years ago. I remain so still. I am gate-keeper. I attend to delivery orders when they are brought to me. My duty is, to point out the pens in which the sheep and pigs are placed." He is there describing his duties during the time of the show. Upon his cross-examination, Sharman says: "I am a builder and contractor. I am also gate-keeper. I make four tenders every year,—one for receiving and delivering the implements, one for sweeping and carting away the litter, one for putting up the fittings, and one for receiving and delivering the cattle. In 1873, my tenders were accepted. I am paid a lump sum in respect of each tender. I send the tenders to the Hall Company. I am paid by the Hall Company. I take my instruc-

(1) 4 Ex. 244; 20 L. J. (Ex.) 65.
(2) 5 Ex. 721; 20 L. J. (Ex.) 9.
(3) 12 A. & E. 737; 10 L. J. (Q.B.) 19.
(4) 11 C. B. 867; 21 L. J. (C.P.) 52.
(5) 3 H. & C. 462; 34 L. J. (Ex.) 14.
(6) Law Rep. 8 Q. B. 57.
(7) Law Rep. 10 Q. B. 437.

[5 K & 10 Jur. N.S. 1207]

tions from the stewards of the Smithfield Club. The defendants do not interfere with me in the discharge of my duties. The owners of the animals admitted have to bring with them an admission order signed by the secretary of the club. I employ a number of men to carry into effect my various contracts. I pay them. The Agricultural Hall Company has no authority over me and my men. I cannot say one way or the other whether I did or did not point out these sheep." Now, one question which arises upon that evidence, and upon which a good deal of the argument has turned, and which no doubt is an arguable question, is, whether Sharman, with reference to the Agricultural Hall Company, the defendants in this action, was in the position of a servant or in that of a contractor. With reference to the opinion which I have formed, and upon which I ground my judgment, that question becomes immaterial. All the duties performed by Sharman with reference to the cattle-show were duties to be performed by him under the orders of the stewards of the Smithfield Club. The evidence of Sharman as to this is distinct. This view is supported by the clause in the agreement by which it is provided that "the said Agricultural Hall Company, at their own expense, shall furnish and provide a sufficient number of able-bodied men for unloading, loading, and arranging the implements, seeds, roots, and other articles and things, and in addition thereto shall pay six men, or more if certified by the secretary for the time being to be necessary, who are to be selected by the secretary or stewards of the said club for the time being, to unload, load, and feed the animals in the yard, the same men respectively to be entirely under the direction of the secretary or stewards of the club for the time being." Looking at the documents in the case, I find that the whole of the dealings with the exhibitors are with the Smithfield Club, and not with the Agricultural Hall Company. And I think Mr. Wheeler, in his very able argument, did not go too far when he said that, so far as the exhibitors and those persons to whom they might sell their property were concerned, the Agricultural Hall Company are strangers. The admission order, which is signed by the secretary of the Smithfield Club, is addressed "To the gate-keeper of the show at the Agricultural Hall, Islington." The hall and the services of the attendants seem to

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have been entirely given up to the Smithfield Club, who had the sole and entire control of the show, and who issued the delivery orders for restoring the animals or articles exhibited after the show. The 40th rule of the Smithfield Club, upon which both sides have placed reliance, seems to me to be important as shewing that the whole management of the show was in the hands of the Smithfield Club. It provides that "the blank printed form of delivery order furnished by the secretary must be signed by the exhibitor or his agent, and must be given up at the yard by the person coming to take the stock away after the close of the show." It then goes on, "The club will not in any case or under any circumstances hold itself responsible for any loss, damage, or mis-delivery of live stock or any article exhibited at the Club's show." All the dealings of the exhibitors are with the stewards of the Smithfield Club; they know nothing of the Agricultural Hall Company, except that the Agricultural Hall is the name of the building in which the Club holds its annual show. And, assuming that Sharman may at other times and for other purposes have been the servant of the Agricultural Hall Company, all the evidence and the documents shew that for this purpose he was acting as the servant of the Smithfield Club, to whom his services were for the time transferred. I think the case falls within the principle of those in which an employer is held not to be responsible for the acts of his servant when not acting within the scope of his employment. It may be that in this case the Smithfield Club have by their conditions exempted themselves from liability; but that will not enable the plaintiff to saddle the Agricultural Hall Company with the loss. For these reasons, I think this rule must be made absolute.

ARCHIBALD, J. I am of the same opinion. It is sought to make the defendants liable in this case for the default of Sharman, upon the ground that he was the servant of the defendants and committed this default in the course of his employment as their servant. The principles which govern the liability of employers for the acts of their servants have been very fully discussed: but I do not think it necessary to advert to them, because I am prepared to agree in the view taken by my Brother Grove. The

argument on the part of the plaintiff must proceed upon the assumption that the sheep in question were in the custody of the Agricultural Hall Company, or rather in the custody of Sharman as the servant of the Agricultural Hall Company. But, when we consider the arrangement between that company and the Smithfield Club, I think it is clear that, so far as regards the arrangements for the cattle show, Sharman was so entirely placed at the disposal of the Smithfield Club that whatever he did with reference to that was done by him, not as the servant of the Agricultural Hall Company, but as the servant of the Smithfield Club. The arrangement was a peculiar one. It was, that the Agricultural Hall Company should provide a suitable building for the Smithfield Club to hold its annual show in, and should for a term of twenty-one years pay the club 1000*l.* a year for the privilege of holding the show therein for fourteen days in each year, the company providing the requisite fittings and conveniences, and also providing a staff of servants who were to be under the entire control of the Smithfield Club. The parties who brought animals or other things for exhibition made all their arrangements with the Smithfield Club and not with the Agricultural Hall Company. The question to my mind turns upon this,—Was there any privity between the plaintiff and the Agricultural Hall Company? The documents all shew that the arrangements made with the exhibitors were all made with the Smithfield Club, and not with the Agricultural Hall Company. The first document, which is the ticket for the admission of animals to the show, is signed by the secretary of the Smithfield Club. It sets out some of the conditions upon which the animals are to be received: and the evidence was that a copy of those rules was delivered to each exhibitor, and that the animals received at the Hall were received under the conditions and terms embodied in those rules. I will just call attention to one or two of those rules. The first is, that "No charge will be made for hay or straw for any stock, by whomsoever exhibited;" and the fourth, "Every animal shewn for a prize in a class or a medal in extra stock must have been in the possession of the exhibitor at least six months previous to the show, excepting pigs not exceeding nine months old, which can only be exhibited by the breeder." Amongst these rules there

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is one,—the 40th,—which was inserted for the purpose of freeing the Smithfield Club from liability for "loss, damage, or misdelivery." I agree with my Brother Grove that the first part of that rule is of extreme importance. "The blank printed form of 'delivery order' furnished by the secretary," that is, the secretary of the Smithfield Club, "must be signed by the exhibitor or his agent, and must be given up at the yard by the person coming to take the stock away after the close of the show." These sheep, then, were received by the Smithfield Club upon an understanding that they shall not be re-delivered to the exhibitor except upon certain conditions, viz. upon giving up the delivery order (signed) to the person in charge of the yard. The case is not as if the sheep had been in the custody of the Agricultural Hall Company or of Sharman as their agent without any condition as to the re-delivery. In that case, if there had been a demand made upon them or upon Sharman for the possession of them, a refusal to deliver them would have been evidence of a conversion. But the whole of the documents shew that the sheep were delivered to the Smithfield Club, and that they are only to be re-delivered in accordance with rule 40, and that the person who redelivers them is acting under the orders of the Smithfield Club. It is impossible to say that Sharman was acting in this respect as the servant of the Agricultural Hall Company. I quite agree that, if it was shewn that there was any agreement on the part of the Agricultural Hall Company to re-deliver the sheep (which would necessarily involve an admission that they had the custody of them), and a refusal so to do, it would have been perfectly immaterial to consider whether Sharman was their servant or not, or whether he was a mere contractor; for, in that case, it is clear, upon the authorities, that the Agricultural Hall Company would be liable for his default: *Mersey Docks Company* v. *Gibbs.* (1) But that pre-supposes the existence of a duty on the part of the defendants towards the plaintiff: and it seems to me that these documents negative the existence of such a state of things. The contract is between the plaintiff and the Smithfield Club; and the duty is imposed upon the latter, who would clearly be liable for a breach committed by the person who acted for them, if they had

(1) Law Rep. 1 H. L. 114.

not by the latter part of the same rule protected themselves from responsibility "for any loss, damage, or mis-delivery of live stock or any article exhibited at the Club's show." That being so, I see no ground upon which the present defendants can be held liable for any default of Sharman. In my judgment, he was not in any way acting in the matter as their servant. For these reasons, I agree with my Brother Grove that the rule to enter a nonsuit should be made absolute.

LORD COLERIDGE, C.J. This case was tried before me, and the jury found a verdict for the plaintiff for 19*l.* 10*s.* It appeared on the discussion which took place at the trial that the plaintiff might have had his sheep back on the same evening or at the latest the day after the occurrence of the mistake, and that little (if any) damage would have been sustained, but for his own loss of temper. Although, therefore, I am not without some doubt, I have not thought it worth while to take time to consider in order to ascertain whether upon reflection this doubt would be strengthened into difference of opinion with my two learned Brothers. The grounds of my doubt are, not that I in the slightest degree question the principles of law which are applicable to this case, but merely as to how far the facts bring it within those well-recognized principles. There are two parties here who appear to be interested in different degrees in this agricultural show,—the Agricultural Hall Company (the defendants), and the Smithfield Club. The show takes place in the building and premises of the defendants. There is no demise of the building to the Smithfield Club; but the Smithfield Club have the conduct and management of the show. All the documentary dealings in relation to it are between the exhibitors and the Smithfield Club; and the defendants are to be made liable in this case, if liable at all, in consequence of the act or omission of Sharman. The whole question is whether there was any duty on the part of the defendants to re-deliver these sheep to the plaintiff. If there was any such duty, they have not fulfilled it; for, there clearly has been a conversion. I apprehend the law on this subject has been laid down in the clearest and best possible terms, partly in quotation and partly in original dictum, by Blackburn, J., in the

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opinion which he delivered in the House of Lords in the case of *Mersey Docks Trustees* v. *Gibbs* (1), to which reference was made in the course of the argument. The passage from the judgment of Williams, J., in *Pickard* v. *Smith* (2) has been read more than once, and I will not read it again. But the whole matter is summed up by Blackburn, J., to this effect:—"Liability," he says (3), "for doing an improper act depends upon the order given to do that thing; and the liability for an omission to do something depends entirely on the extent to which a duty is imposed to cause that thing to be done." I observe parenthetically that the last of those two cases is the case here. "And in the last two cases, it is quite immaterial whether the actual actors are servants or not." Now, in this case, the duty of receiving and re-delivering the stock, as between the Smithfield Club and the defendants, was clearly a duty assumed by the defendants. According to Sharman's evidence, he had entered into amongst others a contract with the defendants to receive and to re-deliver the stock and other things exhibited. That, however, I quite admit does not dispose of the matter; because, although as between themselves and the Smithfield Club, and as between themselves and Sharman, the defendants could not deny that it was their duty to receive and to re-deliver, it may well be,—and my learned Brothers have come to that conclusion,—that, upon the facts proved and admitted, there was no contract as between the plaintiff and the defendants which raises a duty in the latter to re-deliver. Now, I quite admit that upon the documents no such contract exists at all so far as the defendants are concerned. They prove only a contract between the plaintiff and the Smithfield Club. The way in which it struck my mind in the course of the argument, and the way in which I am not convinced that it may not be properly put, is this, that the true view of the case is that the Smithfield Club conduct the show, but that they conduct it on the premises of third persons, viz. the defendants, and that they contract as between themselves and the exhibitors that the stock and implements shall be exhibited on the defendants' premises according

(1) Law Rep. 1 H. L. 114. (2) 10 C. B. (N.S.) 480.
(3) Law Rep. 1 H. L. 115.

to certain conditions which are to bind them; and further they contract, in the event of what has happened here, viz. a misdelivery of stock exhibited, that the Smithfield Club shall be in no way answerable to the plaintiff. My mind is, however, by no means free from doubt whether from the receipt of the animals by the defendants upon their premises through the hands of a man, be he contractor or be he servant, employed and paid by them to receive and to re-deliver, there is not an implied contract between them and the exhibitors for the breach of which they may be liable. My impression is not sufficiently strong to induce me to differ from the rest of the Court, and therefore I concur, though with some hesitation, that the rule to enter a verdict for the defendants should be made absolute.

Rule absolute.

Feb. 17. The plaintiffs appealed against this decision, and the appeal was argued by *Herschell, Q.C.*, and *Candy*, for the appellants: *Day, Q.C., Grantham*, and *Wheeler*, for the respondents, not being called upon.

THE COURT (James and Mellish, L.JJ., Baggallay, J.A., Mellor, J., and Cleasby, B.), affirmed the decision of the Court below, being of opinion that there was no privity of contract between the plaintiff and the defendants as to the receipt and redelivery of the stock, and no duty for the breach of which they could be held responsible.

Judgment affirmed.

Solicitors for plaintiff: *Angell & Imbert-Terry.*
Solicitors for defendants: *Kingsford, Dormer, & Kingsford.*

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NEWELL *v.* THE NATIONAL PROVINCIAL BANK OF ENGLAND.

Administration Suit—Order for taking an Account of Debts and Liabilities affecting the personal Estate of Intestate, under 23 & 24 *Vict. c.* 38, *s.* 14—*Set-off—Counter-claim—Judicature Act,* 1875, *Order XIX, Rule* 3.

13 C.D. 23
46 L.J. Ch. 148

To an action by an administrator for the balance of the intestate's banking account at the time of his death, the defendants in their statement of defence sought to avail themselves, either by way of set-off or of counter-claim, of a debt due to them from the intestate as one of several makers of a promissory note for 1000*l.* which did not become due until after the intestate's death. Reply, that, before action, an order was made in an administration suit in the Chancery Division, to take an account of the debts and liabilities affecting the personal estate of the deceased, of which the defendants before action had notice; and that, under s. 14 of 23 & 24 Vict. c. 38, equity would restrain any proceedings on the note until the account had been taken. On demurrer to this reply:—

Held,—upon the authority of *Rees* v. *Watts* (11 Ex. 410), that the claim in respect of the promissory note could not be relied on as a set-off; and that, in accordance with the practice in Equity, the defendants must under the circumstances be restrained from setting it up by way of counter-claim, and be left to prove for it in the administration suit.

STATEMENT of claim, 23rd November, 1875.

1. Frederick Palmer Martindale (hereinafter called the deceased) died on the 9th of August last, and on the 20th of September following letters of administration were duly granted to the plaintiff, who was a creditor of the deceased.

2. The defendants are bankers, and had in their possession at the date of the death of the deceased a balance due to him of 80*l.* 7*s.* 3*d.*

3. On or about the 27th of September, the plaintiff, as administrator of the deceased, demanded payment of this balance, which was refused.

The plaintiff, as administrator of the deceased, claims, 1. 80*l.* 7*s.* 3*d.*, together with interest thereon from the date of application for payment up to execution, 2. such further or other relief as the nature of the case may require.

Statement of defence and counter-claim, 30th November, 1875.

1. On the 21st of April, 1875, the deceased and certain other persons made their joint and several promissory note, whereby they jointly and severally promised to pay to the defendants or

10 Jur. N.S. 1029.

their order the sum of 1000*l.* four months after date, for value received.

2. The note became due on the 24th of August, 1875; but neither the deceased, or the plaintiff on behalf of the deceased, nor any of the said other makers of the note have paid the same, and the said note remains still due and unpaid.

3. The defendants claim from the plaintiff, as administrator of the deceased as aforesaid the amount of the said note and interest thereon to judgment, and such further and other relief as the nature of the case may require.

Reply, 21st December, 1875.

1. The plaintiff relies by way of defence to the defendants' counter-claim, as a matter of equity, that the promissory note mentioned in the defendants' counter-claim was made by the deceased jointly and severally with certain other persons as a collateral security for the re-payment of money lent by the defendants to the Equitable Permanent Land, Building, and Investment Society, and did not become due till after the death of deceased.

2. On the 2nd of November, 1875, an order was made in the Chancery Division to take an account of the debts and liabilities affecting the personal estate of the deceased, and before action notice was given to the defendants that their claim, if any, would be adjudicated upon in due course.

3. Under the provisions of 23 & 24 Vict. c. 38, any proceedings at law in respect of the said promissory note might and would have been restrained until the account directed by the above order had been taken, which has not yet taken place.

Demurrer, 4th January, 1876.

The defendants demur to the plaintiff's reply, on the ground that the plaintiff does not shew that the defendants have not a right to retain in their hands the balance due to the deceased and now sought to be recovered from the defendants by the plaintiff in his statement of claim, and upon other grounds sufficient in law to sustain this demurrer.

Mansel Jones, in support of the demurrer. The plaintiff can be in no better position than the intestate was in at the time of

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his death. At that time the bank owed the intestate 80*l.* 7*s.* 3*d.*, and they had a claim against him on a promissory note (which was not then due) for 1000*l.* The plea is good by way of set-off, and the replication is no answer to it. There is no allegation that the note has been paid by the other parties to it; therefore primâ facie the money is due from the deceased. Set-off has the same effect as a counter-claim: Order XIX, Rule 3.

[BRETT, J. Can there be any doubt that a Court of equity would under 23 & 24 Vict. c. 38, s. 14 (1), have restrained the defendants, if, instead of a set-off or counter-claim, this had been an original action?]

No doubt a Court of equity would have restrained a proceeding at law pending the administration suit, upon a proper application. Still it is competent to this Court, under s. 24, subs. 7, of the Judicature Act of 1853, to do complete justice between the parties. This is a claim in respect of which the defendants would have had a clear right of set-off in bankruptcy: *Alsager* v. *Currie.* (2)

Prideaux, Q.C. (*Castle* with him), contrâ. *Alsager* v. *Currie* (2) was a case of mutual credit under the Bankrupt Act, 6 Geo. 4,

(1) 23 & 24 Vict. c. 38, s. 14: "The order to take an account of the debts and liabilities affecting the personal estate of a deceased person pursuant to s. 19 of 13 & 14 Vict. c. 35, may be made immediately or at any time after probate or letters of administration shall have been granted; and such order may be made either by the Court of Chancery upon motion or petition of course, or by a judge of the said Court sitting at chambers, upon a summons in the form used for originating proceedings at chambers; and, after any such order shall have been made, the said Court or judge may, on the application of the executors or administrators, by motion or summons, restrain or suspend, until the account directed by such order shall have been taken, any proceedings at law against such executors or administrators by any person having or claiming to have any demand upon the estate of the deceased, by reason of any debt or liability due from the estate of the deceased, upon such notice and terms and conditions (if any) as to the said Court or judge shall seem just; and the judge, in taking an account of debts and liabilities pursuant to any such order, shall, on the application of the executors or administrators, be at liberty to direct that the particulars only of any claim or claims which may be brought in pursuance of any such order shall be certified by his chief clerk without any adjudication thereon; and any notice for creditors to come in which may be published in pursuance of any such order shall have the same force and effect as if such notices had been given by the executors or administrators in pursuance of the 29th section of the 22 & 23 Vict. c. 35."

(2) 12 M. & W. 751.

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c. 16, s. 50. The plaintiff's claim here is for a debt due from the defendants to the intestate in his life-time: the defendants' counter-claim is in respect of a promissory note signed by the intestate as surety, and which was not due until after his death. That could not be made the subject of a set-off. In *Beckwith* v. *Bullen* (1), it was held that there is no right either at law or in equity to deduct a loss on a policy underwritten by a testator with a broker, from the amount due to the executors for premiums from the same broker, though the circumstances are such as in case of bankruptcy would support a plea of mutual credit. So, in *Rees* v. *Watts* (2) it was held by the Exchequer Chamber that, to an action by an administrator who sues in his representative character for a debt due after the death of the intestate, the defendant cannot set off a debt due to him from the intestate in his life-time. Sir John Coleridge, in delivering the judgment of the Court, there says (3): "The words of the statute (4) upon which the question in the cause depends are these,—'Where there are mutual debts between the plaintiff and defendant, or, if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other.' The expressions are not very happily chosen, but the meaning seems to us very clear. The case of mutual debts was to be provided for, and the necessity for cross-actions in such cases put an end to. In the first branch of the sentence, the simplest case is mentioned, —that of mutual debts between two living persons,—that is, of debts existing between them, contracted respectively in their individual character. In the second, the case supposed is that of one of these mutual debtors dying and being represented by an executor or administrator, in which case such representative will stand, in relation to the survivor, if suing or being sued, exactly in the same situation as his testator or intestate would have stood in, and the same right of set-off is given. In this latter case it is quite as necessary as in the former that the debts should originally have existed between the two living parties. The executor or administrator to come within the statute must sue or be sued

(1) 8 E. & B. 683; 27 L. J. (Q.B.) 162.
(2) 11 Ex. 410; 25 L. J. (Ex.) 30.
(3) 11 Ex. at p. 414.
(4) 2 Geo. 2, c. 22, s. 13.

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necessarily in his representative character: if not, although he may be called executor, he is really a third party introduced (whereas it is essential that there should be only two concerned), and the mutuality of the debts, without which there can be no set-off, does not exist." The debt sought to be set off here never was a debt due from the intestate. Equity requires mutuality of parties, as well as law. Lord Selborne, in delivering judgment in the Court of Appeal in *Re Paraguassu Steam Tramway Co., Black & Co.'s Case* (1) says: "What is the ordinary law of set-off? It is what in the Civil law was called compensation, and simply means this,—that, when you have got two cross-demands of a nature substantially the same, and due to and from A. and B. in the same right, that is to say, when the one is a creditor in his own right and debtor also in his own right to the other, the one debt may be set off against the other at the option of the party from whom payment is demanded. But it is essential in such cases that the rights should be substantially the same. If they were apparently the same at law, but different in equity, set-off would not be allowed here; nor do I suppose that, in the present state of the law (2), it would be allowed at common law either."

Then, if the defendants are only entitled to avail themselves of this defence by way of counter-claim, which is equivalent to a cross action, a Court of equity would clearly have restrained the defendants before the passing of the Judicature Acts: *Re Cole's Estate* (3); *Middleton* v. *Pollock* (4): and this Court will now, under Order XIX, Rule 3, do the same. (5)

Cur. adv. vult.

Feb. 18. BRETT, J. In this case, which was argued before us

(1) Law Rep. 8 Ch. 254, 261.

(2) At the close of 1872.

(3) 17 L. T. 494.

(4) Law Rep. 20 Eq. 515.

(5) Reference was made to a dictum of Sir James Mansfield, in *Brady* v. *Sheil* (1 Camp. 148), to this effect,—"He wished it were more generally known (for he believed that lawyers in the Court of King's Bench were not aware of it) that, through the medium of a Court of equity, the creditors of a deceased insolvent may always be compelled to take an equal distribution of the assets. It was only necessary for a friendly bill to be filed against the executor or administrator, to account; after which, the Chancellor would enjoin any of the creditors from proceeding at law."

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yesterday, the facts as admitted by the demurrer are, that the plaintiff as administrator of F. P. Martindale, deceased, is entitled to demand from the defendants, his bankers, 80*l.* 7*s.* 3*d.*, being the balance of his account in their hands at the time of his decease; but that the defendants have a claim against the estate of the deceased for 1000*l.*, the amount of a promissory note given to them by the deceased. That promissory note, which was made in the life-time of the intestate, did not become due until after his decease; therefore the defendants could not have claimed the amount from him in his life-time. That being the state of things on the claim and counter-claim or set-off, the replication shews that, after the death of the intestate, an order was made in the Chancery Division of the High Court to take an account of the debts and liabilities affecting the personal estate of the deceased, and that notice was given to the defendants that their claim, if any, would be adjudicated upon in due course; and that, according to the practice of that Division under 23 & 24 Vict. c. 38, any proceedings at law in respect of the promissory note would be restrained until the account directed by the order had been taken. To this replication there is a demurrer; and it was argued on behalf of the plaintiff that he is entitled to judgment for the 80*l.* 7*s.* 3*d.*, and that the defendants cannot set up any counter-claim in respect of the promissory note. The first point taken was, that this statement of defence could not be relied on as a set-off, because not specifically stated to be so claimed; and Order XIX, Rule 10, of the Judicature Act, 1875, was relied on. But it seems to me that there is no ground for the objection. I take the decisions to amount to this, that a statement of defence may set out facts to shew that the plaintiff never had any claim, or that, if the claim of the plaintiff be good, the defendant can by payment, set-off, or counter-claim, equal or overtop the plaintiff's claim. Upon this demurrer, therefore, we must consider the case first as if we were sitting as a Court of law under the old system, and next as if we were a Court of equity, and see if there is any and what difference. Now, there is no doubt the plaintiff's claim is a good one, and therefore primâ facie the plaintiff would be entitled to the 80*l.* 7*s.* 3*d.*; and at law the first question would be whether the defendants' claim would be a good subject of set-off. The case

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of *Rees* v. *Watts* (1) seems to be a distinct authority to shew that it could not be relied on as a set-off. It is not brought within the terms of the Statute of Set-off. The plaintiff's claim is a claim by the administrator of a deceased person for a debt due to the intestate in his life-time. The claim which is set up in opposition to that is in respect of a debt which accrued due from the estate after the death of the intestate. The words of the Statute of Set-off, as interpreted by that case, shew that the defendants' claim is one which could not be set off, and therefore at common law the plaintiff would have been entitled to judgment for the 80*l.* 7*s.* 3*d.*, without any deduction, and the defendants would have been driven to a cross action. The question now is, what is the state of things under the new system of procedure under the Judicature Acts? It follows from what I have said that at common law the defendants' claim would have been a matter not of set-off but of counter-claim. In equity this exact state of things never could have existed. The question would have been raised either in an administration suit or under such an order as is mentioned in the replication. The course of proceeding would have been this. The defendants would have been called upon to pay a debt of 80*l.* 7*s.* 3*d.* due to the estate of the intestate. If they disputed their liability, the Court of equity would have directed the administrator to bring an action at law; and the plaintiff would have recovered judgment and had execution, and the amount recovered would have been assets in his hands. If they did not dispute their liability, they would have admitted that they were debtors to the estate to the amount of 80*l.* 7*s.* 3*d.*; but, under the circumstances admitted on this record, they would have claimed as against the testator's estate in respect of the 1000*l.* promissory note. The first question in the administration suit would have been whether this claim could have been relied on under the Statute of Set-off. If it could, the Court would have held that the defendants were entitled to set off the amount of their claim and rank as creditors for the difference: but, upon the admitted facts here, the Court of equity would have held that the claim was not within the Statute of Set-off, and would have insisted upon the plaintiff's claim of 80*l.* 7*s.* 3*d.* being paid; and, when the rest

(1) 11 Ex. 410; 25 L. J. (Ex.) 30.

of the assets of the estate had been received, the defendants would have been entitled to prove as creditors and to take a dividend with the rest. In other words, they would have been obliged to pay the 80*l.* 7*s.* 3*d.* at once; and ultimately they would get a dividend on the 1000*l.* In this state of things, what course are we to adopt? Seeing that there can be no set-off, what are we to do with this claim and counter-claim? It is obvious that the demurrer to the replication cannot be supported. The statement of claim, counter-claim, and replication being good, we must give judgment according to the principles of equity. The result is that the plaintiff must have judgment for his debt and costs, including the costs of the demurrer; the defendants being at liberty to prove for the 1000*l.* in the administration suit, and to receive a dividend thereon rateably with the other creditors of the intestate.

ARCHIBALD, J. I am of the same opinion. This precise question could not have arisen under the old procedure: but we are bound to apply the doctrine of equity as far as it is applicable. The plaintiff's claim is for a debt due to the estate of the intestate as the balance of his banking account with the defendants, as his bankers. The defendants in their statement of defence and counter-claim seek to avail themselves of a set-off; and I agree with my Brother Brett that the form in which it is pleaded would have been sufficient if the subject-matter had been one which could have been relied on as a set-off. But, as the claim in respect of the 1000*l.* promissory note did not mature in the life-time of the maker (the intestate), it cannot be set off against a debt due to the deceased in his life-time: both debts must be due in the same right: *Rees* v. *Watts.* (1) If therefore it stood as a claim of set-off, it would be no answer to the action. It is then relied upon as a counter-claim. The replication thereto alleges that an order was made in the Chancery Division to take an account of the debts and liabilities affecting the personal estate of the deceased, and before action notice was given to the defendants that their claim, if any, would be adjudicated upon in due course; and that, under the provisions of 23 & 24 Vict. c. 38, s. 14,

(1) 11 Ex. 410; 25 L. J. (Ex.) 30.

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any proceedings at law in respect of the said promissory note might and would have been restrained until the account directed by the above order had been taken, which has not yet taken place. If this counter-claim on the promissory note, therefore, had before the passing of the Judicature Acts been made the subject of an independent action after the making of such an order as that referred to, the bank would have been restrained by the Court of Chancery from proceeding at law. Now, we are asked to give effect to the counter-claim as if it had been an independent action. It comes, therefore, to this: the defence is not available as a set-off; and, if relied on as a counter-claim, we are bound to restrain the defendants from taking any further proceedings in the action. The plaintiff will consequently be entitled to judgment and execution for the 80*l.* 7*s.* 3*d.* and costs; the demurrer will be overruled; further proceedings on the counter-claim will be restrained; and the defendants will be at liberty to prove in the administration suit for the amount due to them for principal and interest on the promissory note.

LINDLEY, J. I am of the same opinion. I will only add that I have looked carefully to see if there was any principle which should require a different rule as to set-off in equity from that laid down by the Court of Exchequer Chamber in *Rees* v. *Watts* (1): but I find none. Then, as to the form of the order. It would obviously be wrong to give the defendants judgment in respect of their counter-claim: that would entail consequences more extensive than would at first sight appear. Of course the defendants are not entitled to any costs, their claim under the promissory note having been asserted after decree and after notice. The proper order under the circumstances therefore will be that which I have put in writing, and which is as follows:—

"Overrule the demurrer; and, the parties admitting that there are no facts in dispute, let the plaintiff be at liberty to sign judgment against the defendants for 80*l.* 7*s.* 3*d.*, and the costs of the action and demurrer (such costs to be taxed); and stay all further proceedings by the defendants in this action, with liberty to them

(1) 11 Ex. 410; 25 L. J. (Ex.) 30.

to prove against the estate of the deceased for the principal and interest due on the promissory note mentioned in their statement of defence and counter-claim."

Judgment accordingly.

Solicitors for plaintiff: *Cobbold & Woolley.*

Solicitors for defendants: *Wilde, Berger, Moore, & Wilde.*

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April 25.

Principal and Agent—Agent's Right to Commission—Effect of Admissions at the Trial.

The defendant, being in want of additional capital in his business, on the 10th of June, 1873, wrote to the plaintiffs (accountants in London with whom he had been in correspondence on the subject), as follows:—"The premises of the B. Works in this town are my property solely, but the business of it is carried on by myself and my partner. In case of your introducing a purchaser of all the premises, or part of them, of whom I shall approve, or in case of your introducing capital which I should accept, I could pay you a commission of 5 per cent. on the amount in either case, provided no one else is entitled to a commission in respect of the same introduction." The plaintiffs succeeded in introducing one W. to the defendant, who advanced him by way of loan a sum of 10,000*l.*, upon which the plaintiffs received the agreed commission. Some few months afterwards the defendant and W. entered into an agreement for a partnership, on which occasion W. made a further advance of 4000*l.* by way of capital to the concern. The plaintiffs claimed commission upon this further advance; and, in an action brought to enforce their claim, they admitted that the advance of the 4000*l.* was not contemplated at the time of the advance of the 10,000*l.*, but that the 4000*l.* was advanced solely in consequence of the negotiation for the partnership between the defendant and W.:—

Held, that the plaintiffs were not entitled to commission on this second advance.

THE first count of the declaration stated that the plaintiffs carried on business under the style or firm of Barnard Clarke, M'Lean, & Co., and the defendant, by a certain instrument in writing addressed to the plaintiffs and signed by the defendant, promised the plaintiffs in the words and figures following, that is to say,—

14 Hamilton Sq., Birkenhead, 10 June, 1873.

Messrs. Barnard Clarke, M'Lean, & Co., Lothbury.

Gentlemen,—The land and premises of the Britannia Works in this town are my property solely, but the business of it is carried on by myself and my partner.

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In case of your introducing a purchaser of all the premises, or part of them, of whom I shall approve, or in case of your introducing capital which I should accept, I could pay you a commission of 5 per cent. on the amount in either case, provided no one else is entitled to a commission in respect of the same introduction.

I cannot, however, place this exclusively and indefinitely in your hands; but must have the liberty to accept or reject any offer made by yourselves for your friends at any time during the negotiation; and, unless I accept any offer, no commission is to be paid by me. I do not mention this with the idea of at once opening up other channels for accomplishing my object as against your own efforts, but merely to retain the power over my property in case I should require to exercise it in any other direction; and this you will see is only reasonable and proper. (Signed) J. Taylor.

Averment, that the persons to whom the said instrument was addressed were the plaintiffs, and the name J. Taylor attached to the said instrument was the signature of the defendant; and that they, the plaintiffs, did at divers times introduce capital to the defendant, and the defendant accepted the same, and that all conditions were fulfilled and all times elapsed and all things happened necessary to entitle, and nothing happened to disentitle, the plaintiffs to maintain this action in respect of the matters hereinafter mentioned: Breach, that, although the defendant had paid to the plaintiffs a commission of 5 per cent. on part of the amount of capital introduced by the plaintiffs to the defendant; yet the defendant had not paid to the plaintiffs a commission of 5 per cent. on the residue of the amount of capital introduced by the plaintiffs to the defendant, and the same remained due and unpaid to the plaintiffs.

There was also a count for work and labour, commission, interest, and money due on accounts stated.

Pleas, to the first count, that defendant did not promise as alleged; that plaintiffs did not introduce at divers times capital to defendant, nor did defendant accept the same as alleged; denial of the alleged breaches; to the second count, never indebted; and to both counts, payment. Issue thereon.

The cause was tried before Lord Coleridge, C.J., at the sittings in London after last Trinity Term. The facts were as follows:— In May, 1873, the defendant, who carried on the business of an engineer and ironfounder at Birkenhead, being desirous of obtaining increase of capital for carrying on his works, entered into a

correspondence with the plaintiffs, accountants in London, for the purpose of finding some person willing to become a partner in his business or to advance him money by way of loan: and ultimately the defendant wrote to the plaintiffs the letter set out in the first count of the declaration. The plaintiffs did procure one Frederick Whatley Wood to lend the defendant 10,000*l.*, and they received for so doing the stipulated commission of 500*l.*

Afterwards, in December, 1874, Wood advanced the defendant a further sum of 4000*l.* under an ageeement for a partnership. The plaintiffs claimed under the agreement declared on a commission of 5 per cent. upon this last-mentioned sum, as being capital introduced by them and accepted by the defendant. It was admitted, however, that the advance of the 4000*l.* was not contemplated at the time of the advance of the 10,000*l.*; and that the 4000*l.* was advanced in consequence of the negotiation for a partnership between Taylor and Wood.

Under the direction of his Lordship, a verdict was taken for the plaintiffs for 200*l.*, leave being reserved to the defendant to move to enter the verdict for him if the Court should be of opinion that the agreement for commission was exhausted by the first advance.

Herschell, Q.C., and *A. L. Smith*, moved accordingly. At the time of the negotiation for the loan of 10,000*l.*, a partnership between Taylor and Wood was not in contemplation. That transaction was completely closed. The plaintiffs had nothing whatever to do with the negotiations which subsequently resulted in a partnership. The agreement clearly contemplated but one transaction: and it may well be doubted whether any commission would have been payable to the plaintiffs upon the 4000*l.* even if it had been an advance by way of loan, and no partnership had been formed or contemplated. To entitle them to succeed here, the plaintiffs must satisfy the Court that they could charge the defendant with commission upon any moneys which Wood might bring in as capital at any time whilst the partnership endured.

Alfred Wills, Q.C., and *Bremner*, contrà. If the advance of the 4000*l.* under the arrangement for a partnership was the fair result of the introduction of the plaintiffs, the latter are entitled to the stipulated commission, upon the principle laid down by Erle, C.J.,

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in *Green* v. *Bartlett.* (1) If the second advance of capital had taken place twenty years after the first, there would be much force in the defendant's objection. The sole question is whether the second advance was an advance within the contemplation of the parties: and that was a question for the jury.

Herschell, Q.C., in reply. One transaction only was contemplated by the letter of the 10th of June, 1873. It being admitted that the second advance was not contemplated at the time of the first advance, and was made solely in consequence of the negotiation for a partnership, the proximity of time is immaterial.

LORD COLERIDGE, C.J. I do not feel quite free from doubt: but, upon the whole, I am of opinion that the verdict must be entered for the defendant. The question turns upon the construction of the letter of the 10th of June, 1873. The defendant being desirous of increasing his business capital, writes as follows:—"In case of your introducing a purchaser of all the premises, or part of them, of whom I shall approve, or in case of your introducing capital, which I should accept, I could pay you a commission of 5 per cent. on the amount in either case." That proposal is accepted by the plaintiffs in terms which do not alter the matter. Shortly after that, viz. in August, 1873, a person named Wood, who was introduced by the plaintiffs, advanced the defendant 10,000*l.*; and the commission upon that advance was paid. Subsequently to that, and in one sense in consequence of that introduction, Wood got into a negotiation with the defendant, and in December in the following year became a partner in his business, and advanced a further sum of 4000*l.* Upon this the question arises whether the plaintiffs are entitled to a commission of 5 per cent. on that second advance. Was that, within the fair meaning of the letter of the 10th of June, 1873, an introducing of capital by the plaintiffs? It is suggested by Mr. Bremner, and truly suggested, that that is a question for the jury. At the trial, Mr. Smith was anxious to go to the jury upon it. And it was to avoid that that the admission was made by the plaintiffs' counsel that the advance of the 4000*l.* was not contemplated at the time of the advance of the 10,000*l.*, but that the 4000*l.* was advanced in con-

(1) 14 C. B. (N.S.) 681; 32 L. J. (C.P.) 261.

sequence of the negotiation for a partnership. Regard being had to the period of the trial at which this admission was made, I think the fair effect of it is, that the advance of the 4000*l.* was made as part of the negotiation for the partnership only, and without any reference to the antecedent advance of the 10,000*l.* How can that be said to be an introducing of capital in pursuance of the agreement? To entitle the plaintiffs to commission, I think the capital must be introduced by the act of the plaintiffs. The true effect of the admission is that the advance of the 4000*l.* was not the consequence, directly or indirectly, of the negotiations referred to in the letter of the 10th of June, 1873; and therefore upon the whole I think the contract declared on was satisfied by the payment of the 500*l.*, and that the defendant is entitled to the verdict.

BRETT, J. The true construction of this contract, as it seems to me, is, that the plaintiffs are to have a commission of 5 per cent. for the introduction by them of capital into the defendant's business at any time after the date of the contract. I do not think the agreement to pay commission is confined to advances made in any particular time or to an advance of one amount; but I think it applies to advances at any number of times. Nor do I think it is confined to capital introduced in any particular form; but it applies equally to advances by way of loan and to advances in the shape of a partnership. The question which arose at the trial was this, whether the advance of the 4000*l.* was the result of any act of the plaintiffs. If in December, 1874, the plaintiffs had introduced any new person, who had advanced the money, I should have thought the defendant would have been bound to pay them the commission claimed. If they had induced Wood to become a partner and to introduce further capital, I should have thought they would have been entitled to commission on that. But I think Mr. Bremner was right in saying that the question is whether the partnership was caused by any act of the plaintiffs. Now, the only act they do is the original act of introduction which led to the advance of 10,000*l.* Was the subsequent partnership the result of that introduction or of an independent negotiation between the defendant and Wood? Causa proxima is

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not the question: the plaintiffs must shew that some act of theirs was the causa causans. Considering the question raised at the trial, and which Mr. Smith wished to have left to the jury, and the admission which was made to meet that argument, I think the admission must be interpreted as meaning that the partnership was brought about by an original agreement between the defendant and Wood, and not by the act or intervention of the plaintiffs. It is true that the advance of the 4000*l.* might not, and probably would not, have been made by Wood, but for the original introduction of the plaintiffs. But that is not enough. I think the plaintiffs have not brought the advance of the 4000*l.* within the contract declared on.

LINDLEY, J. I also am of opinion that the defendant is entitled to have the verdict entered for him. The case really turns upon the construction to be put upon the defendant's letter of the 10th of June, 1873, and the admission made by the plaintiffs' counsel at the trial. Looking at these, the only question is whether the 4000*l.* brought into the defendant's business by Wood in December, 1874, can be considered as capital brought in through the intervention of the plaintiffs. What had the plaintiffs to do with that advance? Only this. A few months before that advance was made, the plaintiffs had introduced Wood to the defendant, and that introduction resulted in an advance by Wood to the defendant by way of loan of 10,000*l.* That was capital introduced into the defendant's business through the intervention of the plaintiffs, for which they were entitled under the contract of the 10th of June, 1873, to receive, and for which they did receive, a commission of 5 per cent. But, in my opinion, that agreement was never intended to extend to anything which might thereafter be introduced in the shape of capital, unless brought about through the intervention of the plaintiffs. And, when we look at the admission made at the trial, that the advance of the 4000*l.* was not contemplated at the time of the 10,000*l.* advance, and that the subsequent advance of the 4000*l.* was made in consequence of the negotiation for a partnership, I cannot help thinking that the only sum introduced by the plaintiffs under the terms of the contract contained in the letter of the 10th of June,

1873, was the 10,000*l.* I observe that at the date of that letter there was already a partnership subsisting between the defendant and another person.

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Judgment for the defendant.

Solicitors for plaintiffs: *Ashurst, Morris, & Co.*
Solicitors for defendant: *Gregory, Rowcliffes, & Rawle.*

FISHER *v.* THE VAL DE TRAVERS ASPHALTE COMPANY.

April 25.

Measure of Damages for Breach of Contract—Costs of consequent Litigation—Proximate Cause.

The plaintiff contracted with a Tramways Company to construct a tramway for them in a public road, and made a sub-contract with the defendants (an asphalte company) under which the latter undertook to lay the asphalte and to keep it in good repair and condition for twelve months. In consequence of the defective state of the asphalte within that period, one H., who was driving along the road, was thrown out of his cart and injured. H. thereupon brought an action against the Tramway Company, who gave notice to the plaintiff. The plaintiff then called upon the defendants to defend H.'s action, but they declined to have any thing to do with it. The plaintiff resisted H.'s claim, and ultimately compromised it for 70*l.*, but was obliged also to pay 40*l.* for the costs of H.'s attorney, and expended 18*l.* more for the costs of defending the action. The jury found that the course taken by the plaintiff in resisting and ultimately compromising H.'s action was a reasonable and proper one:—

Held,—upon the authority of *Baxendale* v. *London, Chatham, and Dover Ry. Co.* (Law Rep. 10 Ex. 35),—that the defendants were liable for the 70*l.*, but not for the 40*l.* or the 18*l.*, these latter charges not being "the natural or necessary consequence" of their default, the contracts between the plaintiff and the Tramway Company and between the plaintiff and the defendants being separate and independent contracts.

THE first count of the declaration stated that the plaintiff was the contractor for the construction of a tramway in Mare Street, Hackney, belonging to the North Metropolitan Tramways Company, and had agreed with the defendants to lay with Val de Travers asphalte and concrete in a workmanlike and efficient manner the said tramway, and to keep and maintain the said asphalte and concrete in good order and condition for twelve months after being so laid as aforesaid, and that all conditions were performed and all things happened and all times elapsed necessary to entitle the plaintiff to have the said asphalte and

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concrete so laid and so kept and maintained as aforesaid: Breach, that the defendants made default therein, and did not lay the said asphalte in an efficient and workmanlike manner as aforesaid, nor did they keep and maintain the said asphalte and concrete after being so laid as required by the contract, but suffered the said asphalte and concrete to sink and become out of repair and worn out; and by reason of the premises a certain person lawfully driving along the said public road upon which the said tramway was laid was thrown from his cart and injured, &c., and, being entitled so to do, made a claim against the North Metropolitan Tramways Company, and the said company reasonably and properly settled the same, and the plaintiff became liable to and had been called upon to indemnify, and actually had indemnified, the said company against such claim so settled by the said company.

The second count stated that the plaintiff became liable to compensate the person injured for the injuries sustained and the expense incurred by reason of the defendants' default.

Plea, not guilty.

The cause was tried before Denman, J., at the sittings in London after Trinity Term last. The facts were as follows:—The North Metropolitan Tramways Company had contracted with Fisher for the construction of a tramway in the parish of Hackney. Fisher made a sub-contract with the defendants to concrete and asphalte the roadway, and to keep and maintain it in good order and condition for twelve months. Within the twelve months the roadway got out of repair, and one Hicks, who was driving along the road, in consequence of the defective condition of the asphalte was thrown from his cart and injured. Hicks thereupon commenced proceedings against the Tramway Company, and they gave notice thereof to the plaintiff. The plaintiff informed the defendants of the claim made by Hicks; but they declined to interfere, telling him he might do as he liked. The plaintiff having taken upon himself the defence of the action by Hicks against the Tramway Company, his solicitor settled the claim by the payment of 110*l.*, being 70*l.* for damages, and 40*l.* for costs. This sum, together with 18*l.*, the costs paid by the plaintiff to his own solicitor, was sought to be recovered in this action.

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The learned judge left it to the jury to say whether Fisher acted reasonably in compromising Hicks's claim. They found that he did; and a verdict was thereupon entered for the plaintiff for 128*l.*

In the last Michaelmas sittings, the Court refused a rule for a new trial which was moved for on the ground that the action was not maintainable, and that decision was affirmed on appeal (1); but they granted a rule nisi to reduce the damages by the two sums of 40*l.* and 18*l.*

Murphy, Q.C., and *Lanyon*, shewed cause. The jury having found that the plaintiff acted reasonably in settling the claim of Hicks against the Tramway Company, he is entitled to recover from the defendants not only the amount of compensation which he paid to Hicks, but also the costs necessarily and properly incurred in ascertaining such amount. That a party is entitled, on the breach of a contract, to recover all such damages as are the natural and necessary result of the breach, is established by a long series of authorities, beginning with *Hadley* v. *Baxendale* (2) and ending with *Horne* v. *Midland Ry. Co.* (3) In Mayne on Damages, 2nd ed. pp. 43, 46, it is said: "It frequently happens that one person is forced to incur expense in legal proceedings in consequence of a breach of contract or tortious act of another." "The question in these cases is, whether the plaintiff, in defending the action, did what a reasonable man would do under similar circumstances, where he had no other judgment but his own to resort to:" *Short* v. *Kalloway* (4); *Ronneberg* v. *Falkland Islands Co.* (5); *Godwin* v. *Francis* (6); *Tindall* v. *Bell* (7); *Collen* v. *Wright.* (8) The defendants will rely upon *Baxendale* v. *London, Chatham, and Dover Ry. Co.* (9) There, H. having contracted with the plaintiffs, who were carriers, for the carriage of two pictures from London to Paris, the plaintiffs contracted with the defendants for the carriage by the defendants of the pictures over a part of the

(1) Ante, p. 259.
(2) 9 Ex. 341.
(3) Law Rep. 7 C. P. 583.
(4) 11 Ad. & E. 28.
(5) 17 C. B. (N.S.) 1; 34 L. J. (C.P.) 34.
(6) Law Rep. 5 C. P. 295.
(7) 11 M. & W. 228, 232.
(8) 7 E. & B. 301; 26 L. J. (Q.B.) 147; affirmed on error, 8 E. & B. 647; 27 L. J. (Q.B.) 215.
(9) Law Rep. 10 Ex. 35.

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distance. The pictures were damaged on the journey by the defendants' negligence. H. thereupon brought an action against the plaintiffs, who gave notice of it to the defendants, and requested them to defend it. The defendants refused, and told the plaintiffs to take their own course. The plaintiffs defended the action brought against them by H. without success, and then brought an action against the defendants to recover not only the damages found by the jury to have been sustained by H., but also the costs of the unsuccessful defence. The defendants paid the damages into Court, but disputed their liability as to the costs. It was held by the Exchequer Chamber that the costs were not recoverable, inasmuch as they could not be considered as the natural consequence of the defendants' default, the contracts between H. and the plaintiffs and between the plaintiffs and the defendants having been separate and independent. Lord Coleridge, C.J., there says (1): "It seems to me that the whole of the costs were incurred for the plaintiffs' own benefit, and were not in any sense the natural and proximate result of the defendants' breach of duty. The judgment appears to me to have proceeded wholly upon the case of *Mors le Blanche* v. *Wilson* (2), which is certainly very like this case, and which, if necessary, should in my opinion be overruled." Lush, J., said: "This is not, as the Court below appear to have thought, a case in which a person incurs a liability in consequence of the neglect or default of another in some duty owing to him." The defendants incurred no liability to Harding, and their liability to the plaintiffs was quite apart from any liability of the plaintiffs to Harding. The costs of defending Harding's action, therefore, cannot be said to be the consequence of the defendants' default. The two things have no connection whatever with each other." Quain, J., said: "The cases which have been referred to, with one exception, are all cases of indemnity, and really have no application here; for, we have to deal with two separate and independent contracts, and it would, it seems to me, be very unreasonable to hold that the plaintiffs should be able to charge the defendants against their will and without their sanction with the costs of an action brought upon a contract made by the plaintiffs with Harding, to which the defendants were no parties,

(1) Law Rep. 10 Ex. at p. 42. (2) Law Rep. 8 C. P. 227.

and with which they had no concern." And Archibald, J., said: "These costs cannot be claimed by reason of the defendants having given any actual authority to incur them. Nor were the plaintiffs compelled to incur them by reason of the defendants' default. In other words, they were not the natural and necessary consequence of that default. The contracts are wholly independent, and the damages recovered against the plaintiffs by Harding were not of necessity the same as those which the plaintiffs could recover against the defendants. The assessment in the first action could not in any shape be conclusive against the defendants." It could not be said there that the defence of Harding's action was reasonable.

[BRETT, J. Suppose Hicks had claimed 1000*l.*, and the plaintiff paid it without dispute, could he have recovered that from the defendants?]

Clearly not.

[BRETT, J. Having reduced the claim by disputing it, the costs incurred in so doing are not recoverable. That seems to be the result of the decision in *Baxendale's Case.* (1)]

Neither *Collen* v. *Wright* (2) nor *Ronneberg* v. *Falkland Islands Co.* (3) was cited in *Baxendale* v. *London, Chatham, and Dover Ry. Co.* (1); and there was no verdict of a jury in the last-mentioned case. Here, the defendants knew they had contracted to lay asphalte in a public street, and that the plaintiff was under a contract with the Tramway Company to do the whole work. They knew that accidents might happen from any default on their part, and that claims for damages would consequently arise, and that legal expenses must be incurred. All this, therefore, must be taken to have been in their contemplation when they entered into the contract in question. The Court of Appeal having decided that the plaintiff is entitled to recover the amount of the damages paid by him to Hicks, the costs incurred in that action must follow as an accessory, these being equally the proximate and natural consequence resulting from the defendants' breach of contract.

(1) Law Rep. 10 Ex. 35.
(2) 7 E. & B. 301; 26 L. J. (Q.B.) 147; affirmed on error, 8 E. & B. 647; 27 L. J. (Q.B.) 215.
(3) 17 C. B. (N.S.) 1; 34 L. J. (C.P.) 34.

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Philbrick, Q.C., was not called upon to support the rule.

BRETT, J. I am of opinion that this rule must be made absolute. This is an action brought by the plaintiff against the defendants for breach of a contract to lay a certain tramway with asphalte and concrete, and to keep and maintain the road in good order and condition for twelve months after being so laid; and the breach is that the defendants did not lay the asphalte in an efficient and workmanlike manner, nor keep and maintain the work as required by the contract. Upon the facts, it must be taken that the defendants were guilty of that breach: and the proper measure of damage would be the cost of putting the road in a proper state of repair. Something else, however, happened. One Hicks, in consequence of the defective state of the road, sustained personal injury, and brought an action against the Tramway Company for negligence. Now, there can be no doubt that the Tramway Company were liable to Hicks, and that Fisher would under his contract with the Tramway Company be liable to them; and the question is what would be the extent of their claim. The claim of Hicks was a claim for unliquidated damages. Upon receiving notice from Hicks's solicitor the Tramway Company forwarded it to Fisher, and Fisher gave notice to the defendants. The defendants declined to have anything to do with the matter. The plaintiff, thereupon, taking up the case of the Tramway Company, enters into negotiations for settling Hicks's claim; and ultimately he settled it for a certain sum, viz. 70*l.* But Hicks had incurred costs to the extent of 40*l.*, which the plaintiff had also to pay. The plaintiff had also incurred 18*l.* costs to his own attorney; and it is to recover these three amounts that the present action is brought.

The plaintiff's contention in effect is this:—In consequence of your (the defendants') breach of contract with me, a man met with an accident, and I was compelled to pay him damages, and also, in order to ascertain the proper amount to be paid to him, you having refused to interfere, I was bound to defend the action in order to prevent his obtaining more than he was justly entitled to; and the jury have found that I did a reasonable thing in so doing; and I claim as the natural consequence of your breach of

contract, not only the cost of putting the road in repair, but also the sum which I paid for damages and costs in Hicks's action, and the costs of my own attorney. To this the defendants answer that the damages paid to Hicks and the costs incurred by the plaintiff in ascertaining the proper amount of those damages, were not the natural and necessary consequence of their breach of contract.

Now, the Court of Exchequer Chamber has said, in the case of *Baxendale* v. *London, Chatham, and Dover Ry. Co.* (1), that, though there is no contract to pay such damages, yet the plaintiff is entitled under circumstances such as these to recover them from the defendant, because the injury to the claimant was the natural consequence of the defendants' breach of contract, and the payment of the damages was equally the natural consequence of the breach. The question then is, whether, where the damages are so far the natural consequence of the defendants' breach of contract, the costs incurred by the plaintiff in ascertaining the amount of those damages is not equally the natural and direct consequence of such breach of contract. It is said there is no contract to pay these costs. That observation, however, applies equally to the damages. But for the case referred to, I must confess I should have been unable to see any distinction between the damages and the reasonable costs of ascertaining their proper amount. But I cannot help thinking that the question is concluded by the decision in *Baxendale* v. *London, Chatham, and Dover Ry. Co.* (1), and that, assuming the damages paid to the person injured to be the direct and natural consequence of the defendants' breach of contract, yet the costs of ascertaining the proper amount of those damages are not sufficiently direct, however reasonably incurred. I can discover no distinction between the two cases in this respect. So far, therefore, as the costs of the plaintiff in Hicks's action and the costs incurred by the present plaintiff are concerned, I think the present case is within the principle of that case. But for that decision, I must confess I should have thought the costs must follow the damages. As, however, we are bound by authority, the rule to reduce the damages must be made absolute.

LINDLEY, J. I am of the same opinion, and for the same

(1) Law Rep. 10 Ex. 35.

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reasons. I am unable to distinguish this case in principle from *Baxendale* v. *London, Chatham, and Dover Ry. Co.* (1)

LORD COLERIDGE, C.J. I also think this case is concluded by authority: and it is not so clear to my mind that I should not, in the absence of that case, have held the same. The cases are all cases of one contract. Here there are two. The Tramway Company contract with Fisher; Fisher contracts with the defendants, and the claim of Hicks arises from negligence of the latter. Are the defendants to be liable to three sets of costs, because the actions may have been reasonably defended? If they are, the consequences may be serious. If not, at which link of the chain are the costs to drop out? It would be extremely difficult to lay down any principle upon which it could be said that one set of costs would be reasonable and another not. The rule must be absolute to reduce the damages to 70*l.*

Rule absolute.

Solicitors for plaintiff: *Stevens, Wilkinson, & Harries.*
Solicitors for defendants: *Drake & Son.*

July 3.

WALKER AND ANOTHER *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Building Contract—Interpretation of Contract—Penalty for Delay—Notice to avoid the Contract—Forfeiture of Implements and Materials.

A building contract by which the plaintiffs contracted with the defendants to construct a dock and other works in connection therewith, provided as follows:—"Should the contractor fail to proceed in the execution of the works in the manner and at the rate of progress required by the engineer, or to maintain the said works, as hereinafter mentioned, to the satisfaction of the engineer, his contract shall, at the option of the company but not otherwise, be considered void as far as relates to the works or maintenance remaining to be done; and all sums of money that may be due to the contractor, together with all materials and implements in his possession and all sums named as penalties for the non-fulfilment of the contract, shall be forfeited to the company, and the amount shall be considered as ascertained damages for breach of contract." The contract provided that "the whole of the works should be entirely completed on or before the 31st of August, 1873." The works were not completed by that date.

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(1) Law Rep. 10 Ex. 35.

There were other clauses in the contract in the following terms:—

"If the contractors shall not complete the said works within the period limited for the purpose, or if they shall become bankrupt, or if from any cause whatever (not arising from any acts done or omitted to be done by the said company contrary to the true intent and meaning of these presents) they shall be delayed or prevented in the completion of the said works according to the specification, it shall be lawful for the company, without any previous notice, to take the works entirely or in part out of their hands, and to employ any other contractor to complete the same."

"Should the engineer be at any time dissatisfied with the nature or mode of proceeding with, or at the rate of progress or maintenance of, the works, or any part thereof, he shall have full power to procure and make use of all labour and materials from the money that may then be due or that may become due to the contractor, but it is hereby expressly declared that the possession of this power by the engineer shall not in any degree relieve the contractor from his obligation to proceed in the execution of and complete the works with the requisite expedition or to maintain them as hereinafter mentioned."

On the 22nd of January, 1874, and consequently after the time fixed by the contract for completion of the works, the defendants gave notice to the plaintiffs to avoid the contract and thereupon took possession of the works and of the materials and implements of the plaintiffs:—

Held, that upon the true construction of the contract the clause above set forth, with reference to the avoidance of the contract and the forfeiture of the contractor's implements and materials, could only be enforced before the time originally fixed for completion of the works had expired.

Roberts v. *Bury Improvement Commissioners* (Law Rep. 4 C. P. 755), distinguished.

SPECIAL CASE.

The plaintiffs were contractors who had entered into a contract with the defendants to construct a dock and certain works in connection therewith. The defendants had, under a clause in the contract, given notice to the plaintiffs to avoid the contract, and had taken possession of certain implements and materials of the plaintiffs.

The facts and material clauses of the contract and the arguments sufficiently appear from the judgment.

The questions for the decision of the Court were:—

1. Whether, upon the facts and under the circumstances stated, the notice given by the defendants, bearing date the 22nd of January, 1874, was valid and effectual to avoid the contract of the 17th of March, 1871, so far as related to the works or maintenance remaining to be done, and to cause to be forfeited to the defendants all sums of money due to the plaintiffs, together with

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all materials and implements in their possession and all sums of money named as penalties for the non-fulfilment of the said contract, or whether the notice was valid and effectual for any, and, if so, which, of the said purposes?

2. Whether, upon the facts and under the circumstances aforesaid, the contract was avoided and the defendants were justified in point of law in taking possession of the plaintiffs' implements and materials?

May 15. *Bidder, Q.C.* (*J. C. Mathew* with him), for the plaintiffs. *Sir J. Holker, A.G.* (*Edwards, Q.C.*, with him), for the defendants.

Cur. adv. vult.

July 3. The judgment of the Court (Brett and Archibald, JJ.) was delivered by

ARCHIBALD, J. The question submitted to us by the special case depends on the true construction of a clause in the contract which is set out in it.

In the early part of 1870, the defendants being desirous of having a dock and channel, and other works in connection therewith, constructed at Garston, near Liverpool, prepared a specification of the works to be done, and a schedule and statement of quantities, for the purpose of receiving tenders.

The plaintiffs, who are contractors for public works, tendered, on the 19th of August, 1870, for the construction of the works for the sum of 114,011*l.* 6*s.* 10*d.*, and the tender was accepted. On the 17th of March, 1871, an agreement was duly executed under the hands of the plaintiffs and under the seal of the defendants for the execution of the work by the plaintiffs, for the said sum of 114,011*l.* 6*s.* 10*d.*, by which the plaintiffs agreed to execute the works mentioned and referred to in the specification, bill of quantities, schedule of prices, and plans, in strict conformity therewith, and to observe the conditions set out in the specification, and that all the powers, liabilities, rights, and privileges mentioned therein, and conferred thereby in respect of such works, might be exercised according to the true intent and meaning thereof.

It was also provided by the agreement as follows,—that "if the said contractors, their executors or administrators, shall not com-

plete the said works within the period limited for that purpose, or if they shall become bankrupt, or if from any cause whatever (not arising from any act or acts done or omitted to be done by the said company contrary to the true intent and meaning of these presents) they shall be prevented from or delayed in proceeding with the completion of the said works according to the said specification, it shall be lawful for the said company, without any previous notice being given to the said contractors, their executors or administrators, or their successors, to take the said works entirely or in part out of their or his hands, and to employ any other contractor or contractors, workman or workmen, either by contract or measure and value, or otherwise to proceed with the said works and complete the same, and in such case the said contractors, their executors or administrators, shall only be entitled to receive such sums as shall have actually accrued due at the time of the works being taken out of their hands as aforesaid, and all expenses incurred by so doing shall be deducted and retained from the money due to the original contractor, or shall be recoverable as liquidated damages by action at law or otherwise. And it is hereby lastly declared and agreed that this agreement shall be taken and construed to be not to prejudice, but to be in confirmation and enlargement of and in addition to and extension of the said specification, and the stipulations and provisions therein contained."

The said specification contained the following provisions:—"The contractor shall from time to time make such alterations in the works as the engineer may think necessary."

"It must be distinctly understood that the whole of the works on this contract are to be executed strictly in accordance with the drawings that may be supplied from time to time, and to the entire satisfaction of the engineer, who, however, reserves to himself the right to make any alterations he may think fit during the progress of the works, but no claim is to be made by the contractor for such alterations, the work being measured and paid for at the list of prices named in the schedule.

"The decision of the said William Baker, or other principal engineer of the railway company for the time being, with respect to the amount, state, and condition of the works actually executed,

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and also in respect of any and every question that may arise concerning the construction of the aforesaid contract, tender, or this specification, or the execution of the works hereby contracted for, or any other matter or thing whatsoever relating to the same, shall be final and binding on the contractor and the company, and without appeal."

"Progress and maintenance of works. Should the engineer be at any time dissatisfied with the nature or mode of proceeding with, or at the rate of progress or maintenance of, the works, or any part thereof, he shall have full power to procure and make use of all labour and materials from the money that may be then due or that may become due to the contractor. But it is hereby expressly declared that the possession of this power by the engineer shall not in any degree relieve the contractor from his obligations to proceed in the execution of and to complete the works with the requisite expedition, or to maintain them as hereinafter mentioned."

And then follows the clause which is in question:—

"Should the contractor fail to proceed in the execution of the works in the manner and at the rate of progress required by the engineer, or to maintain the said works as hereinafter mentioned to the satisfaction of the engineer, his contract shall, at the option of the company, but not otherwise, be considered void as far as relates to the works or maintenance remaining to be done, and all sums of money that may be due to the contractors, together with all materials and implements in his possession, and all sums named as penalties for the non-fulfilment of the contract, shall be forfeited to the company, and the amount shall be considered as ascertained damages for breach of contract."

"Time of completion. The whole of the works are to be entirely completed on or before the 31st of August, 1873, and the contractor will be subject to a penalty of 100*l.* per week for each week the works remain unfinished beyond the time stated."

The contractor entered upon the work early in the month of June, 1871, and continued down to the 22nd of January, 1874.

Up to the 31st of August, the time limited for the completion of the original contract, certificates had only been given for 50,040*l.*

Extensive and important alterations in and additions to the works as originally designed were from time to time made by Mr. Baker, the engineer of the company, who also suspended some of the works for long spaces of time.

After the 31st of August, 1873 (the day fixed for completion of the works), Mr. Baker supplied the plaintiffs with new and altered designs for portions of the works, and monthly certificates of work done were given and paid down to the 10th of January, 1874.

During the years 1872 and 1873 some complaints were made by Mr. Baker that the plaintiffs did not make satisfactory progress with the works, and on the 16th of October, 1873, the following letter was addressed by the plaintiffs to Mr. Baker.

"Dear Sir, "Garston Dock Company.

"The period having expired within which the works included in the original contract were to have been completed, and there still being much work to be done before the dock and its appurtenances are ready for use, we feel it necessary to draw the attention of the board to the facts affecting the progress of the works and our position in relation thereto.

"It is not necessary for us in this communication to enumerate in detail the several alterations which you have found it expedient to make in the details of the work, nor the times at which the orders for such alterations have been given. Suffice it to say that in no one particular has the work been executed in accordance with the contract drawings.

"These alterations have not merely increased the costs to us, and in many cases rendered the prices contained in the schedule inapplicable, but the delays which from time to time have occurred before you found yourself in a position to give us definite instructions as to how the several works were to be carried out has been such that time has long ceased to be of the essence of the contract, and we are quite aware that we are no longer bound to complete within any particular period.

"We may remind you that the delay enforced upon us in more than one most important work has extended over twelve months; and, as instances both of alterations and delays, we will mention what occurred during the month of September last. On the first of that month we received an order requiring us to leave certain

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spaces in the dock walls for crane foundations, involving, not only considerable alterations in the walls, but the taking down of portions already built and the removal of our cranes before the work is completed, thus involving the replacing of them at considerable expense to us.

"On the 12th of September we received a drawing for the invert to the river entrance differing materially from the contract.

"On the 23rd we received a drawing of the river entrance which rendered it necessary for us to set back the walls to the extent of 3 feet to 3 feet 10 inches all round, the foundations for which walls were already excavated.

"This obliged us to alter the position of our steam gantry, which was then in course of erection.

"Of course these delays and alterations not only increase the cost of the work to us by the greater length of time during which our superintendents and plant are employed, but the great rise in wages and the cost of materials have been most serious in their effects. We have no doubt that under these circumstances we are entitled to compensation for all losses arising from these delays, and that this is not a question for your adjudication under the contract. We have, however, no desire (nor do we suppose that you or the directors have) to take any hostile proceedings; on the contrary, we are anxious to complete the works in a manner and in terms which will be just to ourselves and satisfactory to the board; and as we assume that you must now be in a position to furnish complete plans for the remainder of the work which will not require any further modification, we suggest that you shall furnish such plans and instructions without delay, and that a supplemental contract shall be entered into for the completion of the whole within a time to be named, for a sum which shall cover all our claims for extra work, alterations, damages for delays, and other claims.

"In the meantime, we will proceed with the work as rapidly as circumstances will admit, but it must be without prejudice to any of our claims. And you must be good enough to understand that we cannot consider ourselves bound to execute any of the altered work at the prices named in the schedule, or to complete any of the works without compensation for the loss consequent on the delay,

whether direct or indirect, and until we can arrange terms for the completion, we shall require monthly payments to cover costs out of pocket, including a sum to reimburse us for the use of plant, together with 10 per cent. for profit. We trust you will bring this before the board at your earliest convenience.

"Yours truly,

"(Signed) T. & C. Walker.

"William Baker, Esq."

On the same 16th of October, 1873, a meeting of a committee of directors of the defendant company, called "the works committee," was held in London. It was attended by the plaintiff, Thomas Andrew Walker, and Mr. Baker. The plaintiff's letter of that date was read by Mr. Baker to the committee. Mr. Baker complained of want of progress in the execution of the works. The directors said they knew the plaintiffs were entitled to consideration, and offered to allow a year for the completion of the works, and to pay the plaintiffs 5000*l.* in addition to increased prices to be fixed by Mr. Baker for the additional and extra works. This offer was left open, and it was arranged that Mr. Baker should meet Mr. Walker at Garston and try to settle the prices to be paid to the plaintiffs for additional and extra works, after which another meeting of the works committee was to be holden.

On the 4th of November, 1873, Mr. Baker met Mr. Thomas Andrew Walker at Garston.

They went into various calculations, with the view of an adjustment by Mr. Baker of a new schedule of prices, and at parting Mr. Baker said there would not be much difference between them.

The works for which plans had been delivered were then progressing rapidly, and Mr. Walker did not understand Mr. Baker as expressing dissatisfaction at the rate of progress, but Mr. Baker did ask Mr. Walker to put more men on. The works committee met again on the 21st of November, 1873. Mr. Walker and Mr. Baker were both present. The committee asked Mr. Walker to state the lowest terms he would agree to. He named 10,000*l.* as the sum to be paid instead of the 5000*l.* offered on the 16th of

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October, and proposed that the time for completion of the works should be extended to the 31st of December, 1874, also that certain alterations should be made in some parts of the works designed by Mr. Baker, and that a new schedule of prices should be framed for all the extra and additional works. No agreement was come to at that meeting.

On the 13th of January, 1874, Mr. Cope (a member of the firm of Cope, Rose, and Pearson, solicitors, who had been consulted by the plaintiffs as to the proposed new agreement, and who were also the solicitors for Mr. Waring, one of the plaintiffs' sureties) had two interviews with Mr. Baker, the result of which was that he wrote and sent to Mr. Roberts, the defendant's solicitor, a letter, of which the following is a copy:—

"26, Great George Street, Westminster, S.W.
"13th January, 1874.

"Dear Sir, Garston Dock and T. & C. Walker.

"I have had an interview on behalf of Messrs. Walker with Mr. Baker in reference to his letters to them respecting their delay in returning the draft supplemental agreement in connection with their contract for the Garston Dock, which was sent for their perusal some time ago, and he has suggested that I should make my communication to you, and that you will be good enough to lay it before him for his consideration, and that of the committee of works, which, it appears, meets to-morrow morning. The reason Messrs. Walker have been so long in communicating with Mr. Baker on the subject is simply this, that they have not seen their way to obtaining the use of sufficient capital to enable them to make that progress with the works which the supplemental agreement contemplates. Having several large works in hand, all of which have been great drains on their resources, they find that, unless they could command a further amount in the shape of capital of from ten to fifteen thousand pounds, it would be impracticable for them to finish the works by the time the board require; or indeed to make any more expeditious progress with them than (due regard being always had to the impediments put in their way, as detailed in their letter to Mr. Baker of October last), would insure their completion within what, under these circum-

stances, may be considered a reasonable period. They have made every effort to obtain the money they require without success, and an appeal they have made to Messrs. Waring for this farther assistance has been refused.

"In this state of things, though quite willing to go on with the contract at as fast a rate as their finances will enable them to do, and sufficiently so as they are advised to keep them within the spirit of the contract, they yet feel reluctant to stand in the way of the company's attaining their object of an earlier completion, such as the new agreement contemplates, and they would be willing that other parties should come in and complete the contract in place of themselves, if a satisfactory arrangement can be come to to that effect.

"With a view of facilitating such a solution of the present difficulty, I have, after seeing Messrs. Waring, made Mr. Baker a communication from that firm which he will no doubt lay before the committee to-morrow. I shall be very glad if the result is to relieve the Messrs. Walker of the contract, which is apparently too burdensome for them, and at the same time to secure the company the more expeditious completion of the works which they appear to require.

"I remain, dear sir, yours faithfully,
"J. A. M. Cope.

"R. T. Roberts, Esq.,
"Solicitor, Euston Station."

Mr. Cope wrote the letter in the hope that it would lead to an arrangement, which he believed would be for the benefit both of the plaintiffs and their sureties; but he had no express authority from the plaintiffs, or either of them, to write the letter of the 13th of January, 1874, or to see Mr. Baker on the subject of the contract, and the plaintiffs did not know of the contents of the letter till after service of the notice of the 22nd of January, 1874, hereinafter mentioned.

On the 22nd of January the defendants caused the plaintiffs to be served with the following notice:—

"To Messrs. Thomas Andrew Walker and Charles Walker, of

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9, Victoria Chambers, in the city of Westminster, trading under the style or firm of T. & C. Walker.

"Whereas by an agreement dated the 17th day of May, 1871, made between Thomas Andrew Walker and Charles Walker therein and hereinafter designated as the said contractors of the one part, and the London and North Western Railway Company therein and hereinafter designated as the said company of the other part, for the consideration therein appearing, the said contractors covenanted and agreed with the said company to execute the works required for constructing and completing a new dock and channel, and works in connection therewith, at Garston near Liverpool, as the same were set forth and described in the specification, bill of quantities, schedule of prices, and plans in the said agreement referred to, and covenanted and agreed to observe and perform all the covenants and provisions set out in such specification, and that all the powers, rights, and privileges mentioned therein, and conferred thereby in respect of such work, should and might be exercised according to the true intent and meaning thereof; and whereas by the said agreement it was provided that if the said contractors should not complete the said works within the period limited for that purpose; or if from any cause whatever (not arising from any act or acts done, or omitted to be done, by the said company contrary to the true intent of the said agreement), they should be prevented from or delayed in proceeding with the completion of the said works according to the said specification, it should be lawful for the said company, without any previous notice being given to the said contractors, to take the said works entirely or in part out of their or his hands, and to employ any other contractor or contractors, workman or workmen, either by contract, or by measure, or value, or otherwise proceed with the said works, and complete the same, and that in such case the said contractors should only be entitled to receive such sums as shall have actually accrued due at the time of the works being taken out of their hands, and all the expenses incurred by so doing shall be deducted and retained from the money due to the original contractor, or shall be recoverable as liquidated damages by action at law or otherwise; and whereas by the said

specification it was also agreed that, should the engineer be at any time dissatisfied with the nature or mode of proceeding with, or at the rate of progress or maintenance of the works, or any part thereof, he shall have full power to procure and make use of all the labour and materials which he may deem necessary, deducting the cost of such labour and materials from the money that may be then due, or that may become due to the contractor. But it was expressly declared that the possession of this power by the engineer should not in any degree relieve the contractor from his obligation to proceed in the execution of and to complete the works with the requisite expedition, or to maintain them as hereinafter mentioned, and it was provided that, should the contractor fail to proceed in the execution of the works in the manner and at the rate of progress required by the engineer, or to maintain the said works as hereinafter mentioned to the satisfaction of the engineer, his contract should, at the option of the company, but not otherwise, be considered void as far as relates to the works or maintenance remaining to be done, and all sums of money that might be due to the contractor, together with all materials and implements in his possession, and all sums of money named as penalties for the non-fulfilment of the contract, should be forfeited to the company, and the amount should be considered as ascertained damages for breach of contract; and whereas the said contractors have not completed the said works within the period limited for that purpose, and have not been prevented or delayed from proceeding with the completion of the said works according to the said specification by any act or acts done or omitted to be done by the said company, but great delay has occurred in the completion of the same, and whereas the engineer mentioned in the said specification is dissatisfied with the nature or mode of proceeding with and at the rate of progress of the works, and the contractors have failed to proceed in the execution of the works in the manner and at the rate of progress required by the said engineer. Now the said company do hereby give the said Thomas Andrew Walker and the said Charles Walker, the said contractors, and each of you, notice that they will at the expiration of one week from the date hereof, take the said works

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entirely out of your hands and will, if need be, employ other contractor or contractors, workman or workmen, to proceed with the said works and complete the same, and also that the said engineer on their behalf will procure and make use of such labour and materials which he may deem necessary, deducting the cost thereof, as in the agreement provided. And the said company give you further notice that the said contract shall be considered void as far as relates to the works or maintenance remaining to be done, and that the sums of money, materials, implements, and penalties hereinbefore mentioned shall be and hereby are forfeited to the said company.

"Dated the 22nd day of January, in the year of our Lord 1874.

"Signed on behalf of the said company by

"S. Reay, Secretary."

The question which arises upon this notice is, whether, upon the facts and under the circumstances stated, the notice was valid and sufficient to avoid the contract, so far as related to the works or maintenance remaining to be done, and to cause to be forfeited to the defendants all sums of money due to the plaintiffs, together with all materials and implements in their possession, and all sums of money named as penalties for the non-fulfilment of the said contract, or whether the notice was valid and effectual for any, and if so, which of such purposes.

There is only one clause in the contract which confers any right to avoid it and forfeit the money due to the contractor, with the materials and implements and the sums named as penalties for non-fulfilment of the contract, and the question is, whether the plaintiffs were entitled at the date of this notice to avail themselves of that clause. A good deal of argument was expended on the question whether or not the engineer, within the meaning of the clause, was dissatisfied with the rate of progress or the manner in which the contractors were proceeding, and whether there must not be a requisition in writing or notice of dissatisfaction before proceeding to enforce it, but in the opinion at which we have arrived it is unnecessary to reconsider or decide these points. The object of the clause appears to us to be that the engineer may have the means of requiring the works to be proceeded with

in such a manner and at such a rate of progress as to insure their completion at the time stipulated. If not completed within the time limited, there is another set of clauses applicable, both in the agreement and in the specification, which enables the company to make use of all labour and materials from the money then due or to become due to the contractor, and to take the works entirely or in part out of the contractor's hands, and to employ any other workmen, either by contract or measure and value, or otherwise, and to proceed with the works and complete the same, the contractors in such case only being entitled to receive such sums as shall have actually accrued due at the time of the work being taken out of their hands, all expenses incurred by so doing being deducted and retained from the money due to the original contractor or being recoverable as liquidated damages by action at law or otherwise.

There is no doubt that, as the engineer has power by the contract to vary or alter the works, the contractor must execute them with any variations made, and that he has bound himself to have them completed by the 31st of August, 1873.

There is no provision in the contract for any extension of the time, and therefore, though his contract may involve an impossibility, the contractor is bound to perform it or make compensation in damages: *Jones* v. *St. John's College.* (1) But the question as to the meaning of the clause remains.

In *Roberts* v. *Bury Improvement Commissioners* (2), in which there was a clause somewhat similar, the defendants had given notice to determine the contract and take possession of the works.

Delay was in part occasioned by the act of the board in ordering extra works and otherwise, and it was held that the board were, notwithstanding, entitled to determine the contract and take possession of the works, but there it was assumed that the clause had been put in force before the time originally specified for completion had arrived and before any extension of time had been given.

The clause in our opinion can only be acted on and enforced within the time fixed for the completion of the works, for time is clearly of the essence of the contract, and it is only with reference to the time so agreed that the rate of progress can be determined. If,

(1) Law Rep. 6 Q. B. 115. (2) Law Rep. 4 C. P. 755.

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as has happened, the time has been exceeded, there may be a new contract to complete in a reasonable time; but to give the clause in question any application to a reasonable time after the time originally fixed has expired, would be, without any express provision, to make the company judge in their own case of what was a reasonable time, and to enable them in their own favour to avail themselves of a most stringent and penal clause.

The remaining clauses, which are clearly applicable after the time of completion has expired, are stringent enough, assuming the company not to have insisted on the strict performance of the contract. Here there was a disregard of the time of completion by mutual consent, and a negotiation was on foot for allowing a longer time and enhanced prices to the contractor, but we do not decide the case on that ground, but upon what we consider to be the legal construction of the clause, which could only be enforced before the time originally fixed for completion of the work had expired, and we therefore think the notice of the 22nd of January, 1874, was not effectual for all or any of the purposes mentioned in the question put to us, and that the contract was not avoided. We think the defendants were not justified in point of law in taking possession of the plaintiffs' implements and materials.

Our judgment must therefore be for the plaintiffs with costs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Kendall & Congreve.*
Solicitor for defendants: *Roberts.*

WEIDNER *v.* HOGGETT.

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April 27.

Principal and Agent—Contract—Consideration.

B., W., & Co., who had contracted with a colliery company for 10,000 tons of coal to be delivered over a period of three months at a spout on the Tyne, "the turn to be mutually agreed upon," proposed to charter a foreign ship for the conveyance of 29 keels to Elsinore, and tendered to the captain a charterparty which stipulated for demurrage in unloading the ship, but made no provision for detention in loading her. The captain declined to sign such a charter, without an assurance that there should be no undue detention of his ship; and thereupon B., W., & Co. obtained from the defendant (who was a clerk employed by several colliery companies to arrange the turns for loading) the following undertaking,—

"I undertake to load the ship *Der Versuch*, 29 keels, with Bebside coals in ten colliery working days, &c. On account of Bebside Colliery, W. S. Hoggett."

This memorandum (which made no mention of the person contracted with) was communicated by the charterers to the captain of *Der Versuch*, who thereupon accepted the charter.

The vessel being detained in loading beyond the stipulated ten days, the captain called upon the defendant to pay him 45*l.*, for demurrage. The defendant repudiated all liability, but ultimately offered to pay the captain 20*l.* The defendant had no notice of the charter. In an action by the captain to recover 45*l.* for demurrage from the defendant:—

Held, that, upon these facts, a jury were warranted in finding that the undertaking to load within ten days was a contract between the captain and the defendant; that there was sufficient consideration for it; and that the contract was with the defendant personally, and not as agent.

THE declaration stated that the defendant, for certain considerations moving to him from the plaintiff, promised and undertook to the plaintiff in the words and figures following:—"Sailing ships. Newcastle-on-Tyne, January 17th, 1873. I undertake to load the ship *Der Versuch*, 29 keels, with Bebside coals in ten colliery working days (Sundays, Saturdays, cavilling days, and colliery holidays not working days) after the said ship is wholly unballasted and ready in Northumberland Dock to receive her entire cargo; strikes of pitmen or workmen, frosts and storms, and delays at spout caused by stormy weather, and any accident stopping the working, loading, or shipping of the said cargo, always excepted: time to count from the day following that on which notice of readiness is received; said notice (in writing) to be handed to Mr. R. Thompson as soon as the ship is actually ready as above stipulated, and not before: The ship to move to the

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spout and proceed with her loading whenever required to do so during the entire continuance of her lay days. The non-fulfilment of any of the above-mentioned conditions to render this guarantee null and void :" Averment of performance of conditions precedent : Breach, that the defendant did not load the said ship in ten colliery working-days within the true intent and meaning of the said writing, &c.

Pleas,—1. a denial of the promise,—2. a denial of the breaches alleged,—3. as a defence upon equitable grounds, that the promise and undertaking was made by the defendant solely as agent for certain persons, owners of a colliery called the Bebside Colliery, and that, before and at the time the defendant signed the writing in the declaration mentioned, it was agreed and understood between the plaintiff and the defendant that the defendant was to make the said promise or undertaking only as such agent, and was not to make himself liable as principal ; that he, the defendant, signed the said writing in the declaration mentioned in the following manner, " W. S. Hoggett, on account of Bebside Colliery," the plaintiff and defendant bonâ fide believing at the time that the defendant having so signed the said writing would not be personally liable to be sued on the said promise and undertaking ; that he, the defendant, had authority to bind the said owners of the said colliery by signing in the manner aforesaid, and the said owners are bound by the said writing, and are liable to be sued for any breaches of the undertaking or promise therein contained that may have been committed ; and that the plaintiff is inequitably taking advantage of the mistake in drawing the said written instrument contrary to the intention both of the plaintiff and of the defendant. Issue thereon.

The cause was tried before Huddleston, B., at the Durham summer assizes, 1875. The action was brought by the captain of a German ship called *Der Versuch* to recover damages for detention of the vessel beyond the ten days at 7*l.* per day. The defendant is a clerk of the Bebside Colliery Company, who, in December, 1872, made a verbal contract with Messrs. Bilton, Williams, & Co., merchants of Newcastle, to supply them with 10,000 tons of coals, to be delivered over the months of January, February, and March, 1873, the turn to be mutually agreed upon.

In January, 1873, Messrs. Bilton, Williams, & Co. chartered the plaintiff's ship for the conveyance of a cargo of coal (part of the quantity contracted for) from a dock in the river Tyne to Elsinore.

The charterparty stipulated for demurrage in unloading the ship, but made no provision for any detention in loading. The captain of *Der Versuch* at first refused to sign a charter in this form; but he at last consented, upon the merchant's engaging to get an undertaking from the colliery owners that the time consumed in loading her should not exceed ten days. The undertaking declared upon was thereupon obtained, and the charter was executed.

When contracts for coals are made, as in this case, extending over a period, inasmuch as the merchant cannot fix the exact time when he may require the coal and when the ship will be at the spout, and as the colliery owners cannot know what may be the state of their turn-book when the merchant may require the coals, it is part of the agreement between the colliery owner and the merchant that the turn shall be fixed when the merchant is ready to take the coals. The colliery owner keeps a book called the "Turn Book," in which are entered all vessels which he has engaged to load; and, when the merchant requires his coals, before entering into a charter, he goes to the colliery office and looks at the book to ascertain when they can be loaded. When the turn has been fixed, the charter is concluded, and the merchant gets the undertaking from the colliery owner.

In this case it was a clerk of Bilton, Williams, & Co., who went to the colliery office and obtained the undertaking. The undertaking is a printed form, and is torn from a book, a counter-foil being left. The signature in this case was as follows:—"On account of Bebside Colliery. W. S. Hoggett;" the words "Bebside Colliery" being in writing, and the signature placed underneath them. The ship was ready for loading on the 23rd of January, but was not fully loaded until the 14th of February. The captain claimed demurrage; the defendant said he never paid such claims, but ultimately offered the captain 20*l.*, which he refused to accept.

The defendant, on cross-examination, said that he acted under the orders of one Walton, who was the fitter of the Bebside and

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other collieries, but received his salary from the companies; that undertakings in the form in question were sometimes issued with the merchant's name (but only since 1874), and sometimes not; and that, when he gave the memorandum declared on, he did not know that he was giving it with reference to a chaterparty already fixed or about to be fixed.

Walton stated that he was fitter for the Bebside Colliery and for other collieries belonging to the same owners, "different holders, different shares, but the same individuals," and that the defendant was clerk at a salary of 250*l.* per annum, a proportion of which was paid by each colliery according to the coals raised. This witness proved (subject to objection) that the contract for the 10,000 tons of coal was made by him with Bilton, Williams, & Co., deliverable in a given number of months into ships to be provided by Bilton, Williams, & Co. On cross-examination, he said that the claim in question should have come through the merchants, and that it was not the course of business to make these claims where there had been no special arrangement.

On the part of the defendant it was submitted that there was no evidence of any contract with the plaintiff, and that, if there was, the defendant was not liable as principal.

The learned judge directed a verdict for the plaintiff for 45*l.* (an agreed sum), giving the defendant leave to move to enter a nonsuit if the Court should be of opinion that there was no evidence which ought to have been left to the jury of liability on the part of the defendant.

Herschell, Q.C., in the last Michaelmas Sittings, obtained an order nisi to enter a verdict for the defendant, on the ground that there was no evidence of a contract between the plaintiff and defendant rendering the defendant liable to demurrage, either with or without the evidence of the contract and dealing between the Bebside Colliery Company being received; or for a new trial, on the ground of improper rejection of evidence of the contract and dealing between Bilton, Williams, & Co. and the Bebside Colliery Company, and of the fact that the defendant acted as clerk only to the Bebside Colliery Company in giving the document sued on.

C. Russell, Q.C., and *Crompton*, shewed cause. But for the under-

taking given by the defendant on the 17th of January, 1873, the plaintiff would have been without remedy for demurrage: he was therefore perfectly justified in refusing to execute the charterparty until he got an undertaking that his ship should be loaded within a given number of days. The defendant is not the less liable because he professes to sign the undertaking as agent: see *Tanner* v. *Christian* (1), *Lennard* v. *Robinson* (2), *Parker* v. *Winlow* (3), and the other cases cited in the notes to *Thomson* v. *Davenport* (4) in 2 Sm. L. C. 7 ed. 384 et seq. The contract was clearly made for the plaintiff's benefit, and he is entitled to sue upon it. As far as it was a question for the jury, they have decided it in the plaintiff's favor.

Gainsford Bruce (*Herschell, Q.C.*, with him), in support of the order. The undertaking was given to Bilton, Williams, & Co. or to the charterer; the defendant made no contract with the plaintiff. The existence of a charterparty was not brought home to the defendant.

LORD COLERIDGE, C.J. I am of opinion that this order should be discharged. The action is brought upon an undertaking (signed by the defendant) to load the ship *Der Versuch* with Bebside coals in ten colliery working days; and it is admitted that she was not so loaded, and the ascertained damages for the breach of the undertaking are 45*l*. The defence set up is, that there is no contract between the plaintiff and the defendant. I am, however, of opinion that there was evidence for the jury that the contract declared on was made with the plaintiff. What is the fair meaning of such an undertaking? The case may be put on either of two grounds. The plaintiff, the master of *Der Versuch*, had declined to accept a charter in the terms in which it was offered to him, and which appears to be a form which is commonly known, unless this undertaking was procured for him by Bilton, Williams, & Co. It was procured, and there was abundant evidence that it was procured for him; and, when a claim was made upon the defendant under it he admitted that there was a contract, but disputed

(1) 4 E. & B. 59; 24 L. J. (Q.B.) 91.
(2) 5 E. & B. 125; 24 L. J. (Q.B.) 275.
(3) 7 E. & B. 942; 27 L. J. (Q.B. 49.
(4) 9 B. & C. 78.

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the extent of it, and offered to pay the plaintiff 20*l*. I think that was a sufficient acknowledgment of the contract to render the defendant liable upon it. I cannot, however, help thinking that the verdict is sustainable upon another ground. Although the other party is not named in it, it would seem to me to be a contract by the defendant with any one who may be concerned, and who acts upon it. As to the signature, Mr. Bruce does not deny that it was, according to the authorities, sufficient to bind Hoggett as principal.

BRETT, J. The only question argued was whether there was evidence that this contract made by the defendant was made with the plaintiff. It was contended that it was a contract with Bilton, Williams, & Co., and not with the plaintiff. I must confess I think the case is not free from difficulty; but, upon the whole, I come to the conclusion that there was evidence to justify the jury in finding that the contract was made with the plaintiff. The contract was made with reference to a foreign ship; and, according to a well-known custom where the charterers are acting for a foreign merchant, it was proposed to the captain to insert a clause in the charterparty stipulating for demurrage in unloading the ship, but making no provision for detention in loading her. This the captain refused to assent to without receiving an undertaking which would secure him from undue detention. Accordingly Bilton, Williams, & Co. obtain for him the undertaking declared on, to satisfy his claim if the ship should be detained. The charterers, it appeared, had a contract with the colliery owners for a supply of 10,000 tons of coal within three months: and it is said that this undertaking was an agreement between the charterers and the colliery owners, in furtherance of that agreement. So treating it, it would be idle; there would be no consideration for it on either side. It is true that the defendant had no notice of the charter: but he knew from its name that the coal was to be put on board a foreign ship, and he knew that the undertaking was given with reference to a ship which traded from abroad. It is fair, therefore, to say that he knew that the agreement was made on behalf of the captain, and could not have been intended to be made for the charterers, who could incur no demurrage for

delay. The captain, therefore, may be treated as an undisclosed principal. I cannot help thinking there was evidence of a contract between the plaintiff and the defendant. Further, the jury were entitled to take into consideration the admission of the defendant when the claim for detention was made upon him by the plaintiff. Both upon the original making of the contract, therefore, and upon the admission, I think there was abundant evidence to justify the jury in finding that the contract was made by the defendant with the plaintiff.

LINDLEY, J. The whole difficulty arises from the use of a printed form beginning "I undertake," and leaving in blank the name of the person intended to be contracted with. We are compelled to look outside the document in order to ascertain to whom or for whom the undertaking could be given. "I undertake to load the ship *Der Versuch*, 29 keels, with Bebside coals in ten colliery working days," must mean an undertaking either with the owner, the charterers, or the captain of the ship. Looking at all the circumstances of the case, it seems to me that there is abundant evidence to shew that the undertaking was signed by Hoggett and given to the charterers for and on behalf of the captain as an undisclosed principal. It is true that Hoggett did not know the plaintiff: but that applies in all cases of contracts made for undisclosed principals. Upon the true construction of the document, I think the plaintiff was the proper person to sue and the defendant the proper person to be sued upon it. The printed form shews the place from which the coals were to come, viz. "Bebside Colliery;" but the defendant who signs it does not profess to be acting as agent for any one. I think there was abundant consideration for the contract after it had been acted on. Upon all the grounds therefore I think the order should be discharged.

Order discharged.

Solicitors for plaintiff: *Oliver & Botterell.*

Solicitors for defendant: *Pattison, Wigg, & Co., for G. Armstrong, Newcastle.*

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June 20.

SEAMAN *v.* NETHERCLIFT.

Defamation—Slander—Privilege of Witness.

The defendant, an expert in handwriting, had given evidence in the Court of Probate on the trial of a case called *D.* v. *M.*, in which the genuineness of the signature of the testator to a will was in issue, and had pronounced it as his opinion that the signature was a forgery. The jury found in favour of the will, and the judge of the Court of Probate made some strong observations of an unfavourable nature with regard to the defendant's evidence.

The defendant was afterwards a witness for the defence at a preliminary inquiry before a magistrate into a charge of forgery. The counsel for the prosecution asked him, in cross-examination, whether he had read the remarks made, as above mentioned, by the judge of the Court of Probate, and upon the defendant answering that he had, sat down. The defendant then said he wished to make a statement about the case of *D.* v. *M.* The magistrate said that he could not hear anything about a case not then before the Court, and tried to stop him, but the defendant persisted, and said, "I believe that will to be a rank forgery, and shall believe so to the day of my death."

In respect of the words so spoken the plaintiff, who was an attesting witness to the will, brought an action of slander:—

Held, that the statement was privileged, and the action would not lie, although the jury found that the words were not spoken by the defendant in good faith as a witness, that he spoke them as a volunteer and for his own purposes, and that he spoke them maliciously, and the Court were of opinion that there was evidence to justify these findings.

ACTION of slander.

Plea, not guilty.

The nature of the slander and the facts sufficiently appear from the judgment. The judgment was entered for the plaintiff for 50*l.*, the damages found by the jury, leave being reserved to move to enter it for the defendant.

May 19. *McIntyre, Q.C.*, *R. V. Williams*, and *Hollings*, moved for judgment for the defendant accordingly. The statement made by the defendant was privileged. It was material because it went to his credit. It would have been competent to counsel to re-examine the witness to set up his credit, and if on such re-examination he had said the same thing it would not have been actionable. It can make no difference that he volunteered to set up his own credit by stating that he continued to hold the same opinion in reference to the case alluded to. The words were spoken by him as a witness in a judicial proceeding and in the course of giving his evidence with relation to the subject-matter of the proceeding.

The findings of the jury must be disregarded, for there was no evidence to support them. It would be in the highest degree dangerous to diminish the safeguard afforded to witnesses by making it a question for the jury in every case whether the witness spoke bonâ fide in the exercise of his functions as a witness.

[They cited *Dawkins* v. *Lord Rokeby* (1); *Henderson* v. *Broomhead* (2); *Revis* v. *Smith* (3); *Scott* v. *Stansfield* (4); *Astley* v. *Younge* (5); *Rex* v. *Skinner*. (6)]

Montagu Chambers, Q.C., and *Bowen May*, shewed cause. The question is whether the defendant was acting as a witness when he made these observations. His examination was at an end. The presiding magistrate had ruled that it was so, and in defiance of that ruling and, as the jury find, malâ fide, he persists in making the statement. There must be some limitation to the witness's privilege. The statement to be privileged must be made in relation to the matter in hand. It is submitted that when the witness, after his examination is closed, in defiance of the ruling of the presiding judicial authority as to what is connected with the matter in hand, voluntarily persists in making a statement of such a kind as this, there is evidence that he was not acting as a witness, and consequently was not privileged.

[They cited Bacon's Abridgment, title Slander E.; *Buckley* v. *Wood* (7); *Hodgson* v. *Scarlett* (8); *Trotman* v. *Dunn*. (9)]

R. V. Williams, in reply, cited *Barber* v. *Lissiter* (10); *Lake* v. *King* (11); *Kennedy* v. *Hilliard* (12); *Gwinne* v. *Poole*. (13)

Cur. adv. vult.

June 20. The judgment of the Court (Lord Coleridge, C.J., and Brett, J.), was delivered by

LORD COLERIDGE, C.J. This was an action tried before me at Westminster during the last Hilary Sittings; and, as the facts

(1) Law Rep. 7 H. L. 744.
(2) 4 H. & N. 569. 5 Jur. N.S. 1176.
(3) 18 C. B. 126; 25 L. J. (C.P.) 195. 2 Jur. N.S. 615
(4) Law Rep. 3 Ex. 220.
(5) 2 Bur. 807.
(6) Lofft. 55.
(7) 4 Co. Rep. 146.
(8) 1 B. & A. 232.
(9) 4 Camp. 211.
(10) 7 C. B. (N.S.) 175; 29 L. J. (C.P.) 161. 6 Jur. N.S. 654
(11) 1 Saund. 130.
(12) 10 Ir. Com. Law (N.S.) 195.
(13) 2 Lutw. 1571.

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were somewhat peculiar, and our judgment must as it seems to me depend upon the view which is taken of them, it is necessary to state them.

The action was for defamation. The defendant did not deny uttering the words complained of: but he contended that, under the circumstances, the action would not lie. The circumstances were these: The plaintiff is an attorney who had, together with a Mr. Parsons, attested a will which had been the subject of a suit intituled *Davies* v. *May*, before Sir James Hannen and a special jury in December, 1875. The defendant is an expert in handwriting; and he had given evidence in the suit of *Davies* v. *May*, to impeach the genuineness of the testator's signature to the will which was in dispute in that suit. The jury stopped the case, and found in favour of the will, adding that they thought the imputation made upon the genuineness of the testator's signature entirely groundless. Sir James Hannen stated that he concurred in that opinion; and added some strong observations of his own as to what he thought the recklessness and presumption of the defendant in persisting in declaring that, in his opinion, the signature was forged, in the face of what he the judge and the jury considered to be overwhelming evidence in point of fact that it was genuine. These remarks were published with substantial accuracy in the *Times* newspaper of the next day.

Shortly afterwards, on the 17th of December, 1875, a charge of forgery was preferred against a person named Morphett, before Sir James Lawrence, the sitting alderman at the Guildhall in London; and the defendant was called as a witness on that inquiry for the purpose of establishing the genuineness of the alleged forgeries.

I state what follows from my own notes of the evidence given on the trial of this action by the witnesses who were present at the Guildhall, and whose evidence was not in any manner impeached or qualified by the defendant.

After he had given his evidence in chief, he was cross-examined by the counsel for the prosecution. He was asked whether he had been engaged as a witness in the case of *Davies* v. *May*. He said he had been. He was then asked whether he had read what Sir James Hannen had said as to his evidence in that case. He

said he had. The cross-examining counsel then stopped, and sat down. The defendant then went on to say that he wished to make a statement as to the case of *Davies* v. *May*. Sir James Lawrence said that he could not hear any statement respecting a case which was not before the Court. The defendant then said, after Sir James Lawrence had in vain tried to stop him,—"I believe that will to be a rank forgery, and I shall believe so to the day of my death." These were the words for which the action was brought.

I left the case to the jury, and asked them to answer three questions in writing,—1. Were the words spoken by the defendant in good faith as a witness, or in answer to any question put to him as a witness? 2. Did he speak them otherwise than as a witness, as a volunteer, and for his own purposes? 3. Were they spoken maliciously? The jury answered the first question in the negative, and the second and third in the affirmative; and they found a verdict for the plaintiff for 50*l*. damages.

Very interesting questions are, no doubt, touched by the circumstances of this case, and were discussed upon the argument before us. But the real question, which perhaps cannot be determined without discussing some of them, is this,—Was there evidence to go to the jury in support of the plaintiff's case? If there was, I am of opinion, from all that passed at the trial, that the verdict was perfectly correct. But it may be that the undisputed facts of the case raised no question for the jury, and that I was bound upon those facts to withdraw the case from them, and to hold that a statement made under such circumstances was absolutely and unconditionally privileged, whatever its character, and that no action lay for it. Whether I ought so to have held is really the question to be decided.

The privilege of the various persons engaged in the trial of a suit or action in a court of law, of the judge, of the jury, of the parties, of the counsel, of the witnesses, is under certain circumstances absolute. But the circumstances which give this absolute privilege are not exactly the same in the case of all the different persons whom I have enumerated. It is not, however, now necessary to discuss the differences which affect the respective privileges. In one matter it should seem that all the parties to a judi-

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cial proceeding stand as to privilege upon the same foot. The words spoken, in order to be privileged, must, to use the words of Lord Mansfield in *Rex* v. *Skinner* (1) be "words spoken in office." "Neither party, witness, counsel, jury, or judge," says he, "can be put to answer civilly or criminally for words *spoken in office*." That was a case of indictment against a borough justice; and Lord Mansfield observes that, "to go on an indictment" (and the observation is equally applicable to an action), "would be subversive of all idea of a constitution." It is true that Lord Wynford, in *Allardine* v. *Boswell* (2), Lord Denman, in *Rendillon* v. *Maltby* (3), and the present Lord Chief Justice of England, in *Thomas* v. *Churton* (4), have expressed opinions implying that the words of Lord Mansfield above given are too general, and that they were disposed to hold a judge liable for words spoken even in office, if spoken in abuse of office, with express malice, and without reasonable cause. Individually, I think there is a great deal to be said for that view. But a series of authorities from the time of Lord Coke, and even before his time,—most of which will be found collected in *Scott* v. *Stansfield* (5),—seem to me to have held the contrary; and these authorities bind me here. The authority of *Scott* v. *Stansfield* (5), however, and of every case so far as I am aware to be found in the books applies only to words spoken by a judge in his judicial character, and in the exercise of his functions as judge.

It follows that the words in this action, if they had been spoken by the presiding magistrate, not in his judicial character, and not in the exercise of his judicial function, would have formed the ground of an action against him.

The question in the present action could never have arisen till quite of late years in the case of actual parties to proceedings; because they could speak only by pleading or by affidavit, or when they were conducting their case in person either in a civil or a criminal court. Now, a long course of authorities, of which perhaps the best known, as the most remarkable, is the case of *Astley* v. *Younge* (6), has decided that no action of slander can be brought for any statement made by the parties either in the

(1) Lofft. 55.
(2) 1 Dow. & Cl. 495.
(3) 1 Car. & M. 409.
(4) 2 B. & S. 475.
(5) Law Rep. 3 Ex. 220.
(6) 2 Burr. 807.

pleadings or during the conduct of the case. The law is so stated very clearly by Lord Eldon in *Johnson* v. *Evans* (1): it is so stated also, not indeed with absolute certainty, in a note to the well-known case of *Hodgson* v. *Scarlett* (2), the author of which note, we learn from Baron Alderson in *Gibbs* v. *Pike* (3) to have been Mr. Justice Holroyd himself. But I conceive the law on this point to be now quite certain, although most men of any experience in the profession must have seen many instances in which judicial proceedings have been made by parties to them to serve the ends of private malignity. It is equally certain, however, nor has any question ever been raised, that the privilege of parties is confined to what they do or say in the conduct of the case.

It is not necessary to discuss the case of counsel; but it may be observed that their privilege is at least not greater than that of parties, and that it may be less; for, it has never yet been decided that they would not be subject to an action for words spoken even during the conduct of a case, if the words were irrelevant, malâ fide, and spoken with express malice; all which qualities in the words, it is to be observed, are and must be questions of proof, and for the jury. (4)

The question arising on statements in affidavits is not precisely the question here, whether the statements are made by parties or by witnesses; for, it is almost impossible to imagine a statement in an affidavit to be other than a statement made in the course of a judicial proceeding; and though false and malicious statements, if so made, may be criminally punishable, they are absolutely privileged as regards civil actions.

It is impossible to have cases stronger in their circumstances than *Revis* v. *Smith* (5) and *Henderson* v. *Broomhead*. (6) In the latter case, which is a decision of the Exchequer Chamber and binding upon us, scandalous, false, and malicious statements upon a person not a party to the cause, in an affidavit made in the course of the cause, were held no ground of action: and Crompton, J., laid it down that "no action will lie for words spoken or written in the

(1) 3 Esp. 32.
(2) 1 B. & A. 245.
(3) 9 M. & W. 358.
(4) See per Holroyd, J., in *Hodgson* v. *Scarlett*, 1 B. & A. at p. 247.
(5) 18 C. B. 126.
(6) 4 H. & N. 569.

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course of any judicial proceeding:" and, again: "The rule is inflexible, that no action will lie for words spoken or written in the course of giving evidence." In a case identical with this, *Kennedy* v. *Hilliard* (1), the late Lord Chief Baron of the Exchequer in Ireland reviews with great elaboration the whole series of authorities, and in a most instructive judgment arrives at the same conclusion.

These cases and the case of *Dawkins* v. *Lord Rokeby* (2) seem to establish that, as regards a witness, his privilege for words spoken in giving evidence is absolute and unqualified. "They are not responsible," says Mr. Starkie (3), "in a civil action for any reflections thrown out in delivering their testimony." They have been protected in cases where there was far less excuse, morally speaking, for their slanders than existed for the defendant in the case before us; and though I confess I do not agree with much of the reasoning upon which the absolute and unqualified rule is founded, yet the rule exists, and it is not for me to question it.

Were, then, the words in this case spoken in giving evidence,—in the course of a judicial proceeding? In some cases this must be a question for the jury. In *Trotman* v. *Dunn* (4), Lord Ellenborough left to the jury the character in which the defendant spoke the words; the report stating that the words were spoken while the plaintiff and defendant were attending before the court of conscience; but that it did not appear distinctly in what stage of the proceedings they were spoken, or to whom they were addressed. Instances may be put in which, even where the facts are clear, it would yet be difficult to say in point of law whether the judicial proceeding was or was not going on, and whether the words were or were not spoken in giving evidence. But, if a rule is established as the rule as to the privilege of a witness *is* established, it is the duty of a judge to give it a reasonable interpretation, and not, while admitting it in terms, to attempt to evade it or fritter it away in its application to particular cases. In this case, I think it clear, upon consideration, that the judicial proceeding was going on, and that the words declared upon were part of the defendant's evidence. The cross-examining counsel could not by stopping, as

(1) 10 Ir. C. L. Rep. (N.S.) 195.
(2) Law Rep. 7 H. L. 744.
(3) 1 Stark. on Libel, 242.
(4) 4 Camp. 211.

he did, take away the right of the defendant to complete his answer, nor abridge his legal privilege of immunity for the words of the answer when so completed. The defendant had a right to add to the statement that he had read the remarks of Sir James Hannen the further statement that in spite of those remarks he remained and always should remain of opinion that the will in question was a forgery. The question of counsel was ingeniously suggestive; and the defendant had a right, if he could, to meet the suggestion it conveyed. If relevancy in the words be material for the protection of a witness, I think the words were relevant; for, the defendant's character had been in effect challenged by the counsel, and the defendant had a right to say what he thought would vindicate it. But, whether relevancy be material or not, it seems to me that the main point is clear; and that we could not hold that the defendant's evidence was over, and the judicial proceeding at an end, under these circumstances, without evading or frittering away an established rule of law. I am therefore of opinion that I ought to have withdrawn the case from the jury, and that the judgment should be for the defendant.

I concur entirely in the observations made by Sir James Hannen and the jury before him as to the recklessness and presumption of the defendant: and he persisted in the action before me, in a charge of the most offensive nature, upon no better ground, as he admitted, than his own confidence in his own skill. I do not at all wonder that the jury found as they did; and, if the matter were for them at all, I should have agreed with them entirely. But it was not for them; and the plaintiff must derive such satisfaction as he can from the opinion of two judges and two juries that there was no ground whatever for the charge against his character made and persisted in by the defendant.

My Brother Brett concurs in this judgment, except as to the doubts which I have expressed as to the reasoning of the judges in some of the earlier cases.

Judgment for the defendant.

Solicitor for plaintiff: *Seaman.*

Solicitors for defendant: *Marsden & Son.*

CHARLES AND ANOTHER *v.* BLACKWELL AND ANOTHER.

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May 5.

*Principal and Agent—Agent's Authority to receive Cheques—Absence of Authority to indorse—*16 & 17 *Vict. c.* 59, *s.* 19—*Indorsement "per Procuration" or "as Agent."*

An indorsement of a cheque "per procuration" or "as agent," purports to be an indorsement by the payee within 16 & 17 Vict. c. 59, s. 19, so as to protect the banker who has paid it, though the person by whom such indorsement is actually made has no authority to indorse.

K., an agent of the plaintiffs, having authority to sell goods for them and to receive payment in cash or by cheque, but having no authority to indorse cheques, received from the defendants a cheque on their bankers drawn payable to "S. & Co. (the name of the plaintiffs' firm) or order," and fraudulently indorsed it "S. & Co., per S. K., agent," and misappropriated the proceeds. The bankers having paid the cheque and returned it to the defendants and charged the amount to their account:—

Held, that such payment by the bankers was a payment within the protection of the statute, and that the plaintiffs could not sue the defendants either for the price of the goods or for an alleged conversion of the cheque.

ACTION for the conversion of a cheque, with a count upon the cheque, and a count for goods sold, &c.

Pleas, amongst others, not guilty.

The cause was tried before Lord Coleridge, C.J., at the London Michaelmas sittings, 1875. The facts were as follows:—The plaintiffs carried on business in Milk Street, London, under the name of Charles & Co. They also started a separate business in Jewin Street under the name of Smith & Co., in the conduct of which one Samuel Kingsford acted as their agent. In November, 1874, the defendants bought goods of the plaintiffs through their agent Kingsford, receiving from him invoices headed "Bought of Smith & Co., merchants, London," with the following words in the margin, "Agent, S. Kingsford, Jewin Street." These invoices were made out by the plaintiffs and forwarded to the defendants by Kingsford. In due course the plaintiffs applied to the defendants for payment for the goods, when they found that Kingsford had obtained from the defendants two cheques, for 350*l.* and 150*l.* respectively, drawn by the defendants upon the London and County Bank payable to "Smith & Co. or order." Kingsford never accounted to the plaintiffs for these cheques, but obtained payment of the money from the bank by indorsing them "Smith

& Co., per S. Kingsford, agent," and consequently the cheques got back into the hands of the defendants, the drawers. The plaintiffs in reality only sought to recover a sum of 262*l.*, the extent of Kingsford's defalcation in respect of this transaction. It was admitted that Kingsford had authority to receive payment for goods on account of the plaintiffs in cash or by cheque, but that he had no authority to indorse cheques.

Upon these facts, his Lordship directed a nonsuit.

Herschell, Q.C., obtained an order nisi for a new trial, on the ground of misdirection.

May 5. *Murphy, Q.C.*, and *Channell* shewed cause. The first question is whether the indorsement of this cheque was an indorsement within s. 19 of 16 & 17 Vict. c. 59, so as to justify the bank in paying the amount to Kingsford. The section is as follows:—"Provided always that any draft or order drawn upon a banker for a sum of money payable to order on demand, which shall when presented for payment purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on such banker to prove that such indorsement or any subsequent indorsement was made by or under the direction or authority of the person to whom the said draft or order was or is made payable either by the drawer or any indorser thereof." The banker is supposed to know his customer's signature, but he cannot know that of the indorser. Kingsford was the general agent of the plaintiffs: he was authorized to sell goods for them and to receive payment for them in money or by cheque. If this cheque had been indorsed simply "Smith & Co.," no question could have arisen: the bank would have been justified in paying it. But it will be said that an indorsement "per procuration" (which the indorsement here amounts to) is not within the statute, inasmuch as it does not purport to be an indorsement "by the person to whom the cheque is drawn payable." There is no decided case in banc upon the subject: but there is an unreported nisi prius case of *Cooper* v. *Bank of England*, cited in *Hare* v.

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Copland (1), where Martin, B., ruled that an indorsement in this form, "Jackson & Co., per proc. J. Holmes, Agent," was a sufficient indorsement within the statute to warrant the bank in paying a cheque drawn payable to "Jackson & Co. or order," though it was admitted at the trial that Holmes had no authority to indorse cheques for Jackson & Co., his employers; and that ruling was not questioned. (2) The defendants here have ratified the act of their bankers in paying the draft; therefore, as between them and the plaintiffs, the goods have been paid for to an agent authorized by the latter to receive the money. A payment upon an indorsement in this form is quite as much within the mischief which the statute intended to meet as a signature without the words "per procuration" or "agent." Assuming that to be so, the defendants' money has reached the hands of an agent authorized to receive it for the plaintiffs, and they cannot now have recourse to the defendants either for the cheque or for the price of the goods.

Herschell, Q.C., and *Lumley Smith*, in support of the order. Consider the case apart from Kingsford's authority. The cheque was drawn payable to "Smith & Co. or order," a mode of drawing adopted for the purpose of insuring the proceeds reaching the hands of the payees. Before 16 & 17 Vict. c. 59, if the indorsement was forged, and the bankers paid the cheque upon that forged indorsement, they could not have charged their customers with the payment. Now, there can be no ratification of a forged indorsement, or of a payment made upon a forged indorsement: *Brook* v. *Hook*. (3) As against the plaintiffs, therefore, the payment was not a good payment, consequently the cheque remains their property, and they are entitled to recover it from the defendants into whose hands it has improperly passed, in order that they may present it at the bank with a proper indorsement. The enactment in 16 & 17 Vict. c. 59 makes no difference. The cheque does not "purport to be indorsed by the person in whose favor it is drawn." An indorsement "per procuration" is not an indorse-

(1) 13 Ir. C. L. Rep. 426, 450.

(2) Mr. Justice Christian, at p. 439, referring to the source from which the information as to that case was obtained, viz. a short-hand writer's note of it furnished by the solicitors of the Bank of England, says,—"Really, after having stooped so low for an authority, we are but ill rewarded for our humility."

(3) Law Rep. 6 Ex. 89.

ment by the person to whom the instrument is drawn payable: and this is not even an indorsement per procuration; it is in a singular and unusual form. The acceptance or indorsement of a bill of exchange expressed to be "per procuration" is a notice to the indorsee that the party so accepting or indorsing professes to act under an authority from some principal, and imposes upon the indorsee the duty of ascertaining that the party so accepting or indorsing is acting within the terms of such authority: 1 Parsons on Bills, pp. 119, 120, citing *Attwood* v. *Munnings* (1) and *Alexander* v. *Mackenzie*. (2) The same rule applies to the indorsement of cheques. But little reliance can be placed upon the case supposed to have been decided by Martin, B., at the sittings at Guildhall in Hilary Term, 1860; and it was evidently received with very little favor by one eminent member of the Irish bench in *Hall* v. *Copland*. (3) Kingsford here is just in the same position that the plaintiff's traveller Montgomery was in *Hogarth* v. *Wherley*. (4) There, M., the plaintiffs' traveller, having received an order for goods from the defendant, a customer, the plaintiffs wrote to M. expressing their unwillingness to execute the order until a former account was settled, adding, "We should like to draw upon him (the customer) for the former," mentioning the amount. M. shewed this letter to the defendant, and obtained from him an acceptance at three months' date payable to "my order," with a blank for a drawer's name. This bill was paid at maturity, but not to the plaintiffs, M. having filled up the blank with his own name, and fraudulently negotiated the bill. In an action to recover the price of the goods for which the bill had been given, it was proved that upon one occasion at least the defendant had accepted a bill drawn by M. in blank, which had been received by the plaintiffs as payment; but there was no evidence to shew the form of that bill. It was held (Grove, J., doubting) that neither the letter nor the former dealing was any evidence of authority in M. to draw the bill in question, so as to sustain a plea of payment.

BRETT, J. I am of opinion that this order should be discharged. The plaintiffs were creditors of the defendants upon orders given

(1) 7 B. & C. 278.
(2) 6 C. B. 766.
(3) 13 Ir. C. L. Rep. 426, 439.
(4) Law Rep. 10 C. P. 630.

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to Kingsford, the agent of the plaintiffs. As between the plaintiffs and the defendants, I think it must be taken that Kingsford had authority in the first place to receive in payment a cheque drawn payable to the order of the plaintiffs. But, as between the plaintiffs and the defendants, Kingsford had no authority to indorse the cheque. He did, however, indorse it without the authority or knowledge of the plaintiffs, and in this form,—"Smith & Co., per S. Kingsford, agent;" and the defendants' bankers paid the cheque as if the indorsement had been a genuine indorsement by Smith & Co., and charged the defendants with the payment. Kingsford, having negotiated the cheque in this way, may be assumed to have misappropriated the money, or part of it: and the plaintiffs now sue the defendants, first, in trover for the cheque which had thus got back to the defendants' hands; and, secondly, for goods sold and delivered and for money had and received. The answer on the part of the defendants is, that they are entitled to the cheque, and that they have paid for the goods. It was argued on the part of the plaintiffs that this case must be decided upon the footing that the indorsement was not within s. 19 of 16 & 17 Vict. c. 59, and as if that Act had never been passed; and that, although the defendants did give the cheque to Kingsford, and Kingsford had authority to receive it, yet, inasmuch as he had no authority to indorse for Smith & Co., the indorsement was a fraud upon his employers, and therefore the bankers, who were only authorized to pay the cheque upon the indorsement of Smith & Co., have paid it in an unauthorized manner, and consequently the defendants have a right to say to them, "We authorized you to pay a cheque indorsed by Smith & Co.; you have paid it without such an indorsement, and therefore you have not paid money of ours:" and, the defendants having that right, it is urged that the plaintiffs have an equal right to say to them, "You have not paid us for the goods we sold you." It was further argued that, as the cheque had been held by Kingsford for the plaintiffs, it remained constructively in their possession, the property in the cheque was in them, and the unauthorized indorsement by Kingsford did not take that property out of them: and consequently that, the cheque having come to the hands of the defendants, the plaintiffs have a right to demand it from them, in

order that they may enforce their claim by presenting it at the bank.

On the other hand, it is urged for the defendants that, if the payment by cheque was a good payment, whether the case was within the statute or not, the money was paid on the cheque, and the cheque belongs to them; and that, if the plaintiffs cannot sue them for the money, so neither can they sue them for the cheque. Further, it was argued that the case was within the statute, and that the defendants could not claim the money from their bankers, because they are protected; and that, if the bankers are protected, the defendants must be protected also, and consequently the action was not maintainable.

Now, irrespectively of the statute, I should have been inclined to think that the plaintiffs could not sue the defendants for the money; and on this ground. By virtue of the admission made by the plaintiffs at the trial, the defendants were justified in paying Kingsford by cheque. Kingsford, therefore, having authority to receive a cheque in the form here given, the moment Kingsford received it it became the property of the plaintiffs; but Kingsford's indorsement was an unauthorized and fraudulent act, and before the statute the bankers clearly would not have been justified in paying the cheque, and the defendants would have been justified in refusing to allow the bankers to charge the payment to their account. It is not necessary, however, to decide this, because I think the defendants might have adopted the payment of the cheque by their bankers, and allowed them to charge it to their account: and, if they did so, the money having been received through the act of the agent of the plaintiffs, who had authority to receive payment for them, the plaintiffs could not insist upon the defendants entering into a dispute with their bankers upon the subject. Therefore, as between the plaintiffs and the defendants, the payment would be a good payment. But Mr. Herschell says that the property in the cheque did not pass from the plaintiffs by the unauthorized indorsement. At present, I do not see the answer to that argument, and am inclined to think that the plaintiffs might have recovered back the cheque. But they could not sue upon it, provided the bank was justified under the statute in paying it; and, Kingsford being authorized to receive payment by cheque, as between the plaintiffs and defendants, the payment must be held

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good; and, if the cheque has been properly paid, the plaintiffs cannot maintain trover.

That drives us to consider the construction of the statute. There is some colour for the argument that an indorsement by procuration is not an indorsement by the person to whose order the cheque is made payable, and therefore not an indorsement within the statute. But, upon the whole, I incline to think that that would be putting too narrow a construction upon the statute. I assume that the indorsement here is exactly like an indorsement per procuration; and that the addition of "agent" does not alter its character. A signature "per procuration" is a signature by a person who is authorized to sign as agent for another. The question then is, whether an indorsement by procuration is within s. 19 of the statute; and that depends on whether the indorsement by procuration purports to be the indorsement of the principal. Construing the first part of the section by the second part, I am of opinion that the protection is extended to the banker, not only where the indorsement purports to be made by the payee, but also where it purports to be made by the authorized agent of the payee. Inasmuch, therefore, as the bankers were protected in paying the cheque in question, and the cheque, as between the plaintiffs and the defendants, was a good payment to the plaintiffs through an agent authorized to receive payment in that way, I think the plaintiffs must suffer by their agent's fraud, and that the nonsuit was right.

LINDLEY, J. I am of the same opinion. This case raises two points, one of substance, the other a technical one. The plaintiffs carried on business under the name of Smith & Co. in Jewin Street, by an agent named Kingsford, who had a general authority to sell goods for them and receive payment, which authority, it was admitted, extended to receiving payment by cheques,—a more extensive authority than seems to have been given to the traveller in *Hogarth* v. *Wherley*. (1) Having received the cheque as a payment on behalf of Smith & Co., Kingsford exchanges it for money, and so gets money in payment for goods sold by Smith & Co., the plaintiffs, to the defendants. The plaintiffs now

(1) Law Rep. 10 C. P. 630.

seek to recover again the money which the defendants have thus already paid. It is said that the claim is sustainable on two grounds, first, that the goods have not in fact been paid for, secondly, that, regard being had to the form of the cheque, as between the plaintiffs and the defendants the cheque has not been paid. It seems to me, however, that the goods have in substance been paid for; Kingsford having got the money through the medium of a cheque. Then, as to the more technical point. Let us look at this as an action for or on the cheque. It is said that, as the cheque was indorsed by Kingsford without authority, the payment of the money on that which was equivalent to a forged indorsement will not discharge the defendants. Now, I am not prepared to say that, though Kingsford was the general agent of the plaintiffs, and had authority to receive payment for goods by cheques, he would be authorized to indorse them. I incline to think he would not. The question then remains whether the action can be maintained having regard to s. 19 of 16 & 17 Vict. c. 59. It is said that the statute does not apply, because the cheque does not purport to be indorsed by Smith & Co. the payees. I am not, however, satisfied that the language of the section was not intended to cover indorsements by procuration. I see no reason for holding that it was not intended to protect the banker in the one case as well as in the other. I incline to adopt the view said to have been taken by Baron Martin in *Cookson* v. *Bank of England*, notwithstanding the strictures of Mr. Justice Christian upon that case in *Hare* v. *Copland*. (1) If that be the true construction of the Act, the cheque in question has been paid by the bankers upon whom it was drawn; and, if so, it has been paid by the defendants. If, therefore, the action had been upon the cheque, payment would have been an answer: and it is equally an answer to a claim in trover for the cheque; for, if paid, the plaintiffs cannot be entitled to recover the cheque.

LORD COLERIDGE, C.J. I am of the same opinion.

Order discharged.

Solicitor for plaintiffs: *C. Sawbridge.*

Solicitors for defendants: *Allen & Son.*

(1) 13 Ir. C. L. Rep. 426, 439.

1876
May 3.

ROURKE *v.* THE WHITE MOSS COLLIERY COMPANY.

Master and Servant—Liability of Employer for Negligence of a Fellow-workman—Common Employment—Practice—Costs of Appeal.

The defendants, who were colliery owners, commenced sinking a shaft, for which purpose they employed workmen (amongst whom was the plaintiff) and a steam-engine with a man to drive it. Having proceeded some depth, the defendants contracted with one W. to complete the work. Under this contract W. was to employ and pay the workmen (including the plaintiff), and the defendants were to provide steam power and to pay the engineer's wages; the engineer, however, to be under the orders and control of W.

Through the negligence of the engineer, the plaintiff sustained an injury whilst at work at the bottom of the shaft:—

Held, that, inasmuch as the plaintiff and the engineer were engaged in one common employment under the orders and control of W., the contractor, the defendants were not responsible for the engineer's negligence, notwithstanding that his wages were paid by them.

The Court of Appeal refused to require an insolvent appellant to give security for the costs of the appeal, where the question at issue had not been previously considered in a Court of error.

ACTION against the defendants for alleged negligence in the sinking of a shaft at Skelmersdale, whereby the plaintiff, a workman, was injured.

The cause was tried before Lush, J., at the last winter assize at Liverpool. The facts were as follows:—The defendants, who were the proprietors of a colliery, had commenced sinking a pit or shaft, for which purpose they employed workmen, amongst whom was the plaintiff, and a steam-engine with a man to drive it. Having proceeded some depth they employed one Whittle, under a verbal contract, to carry on the work for them; Whittle was to employ and pay the workmen, including the plaintiff, and the defendants to place steam-power at his disposal in order to facilitate the work. The steam-engine and the engineer (one Lawrence) were to be under the control of the contractor Whittle, but the engineer's wages were to be paid by the defendants. The plaintiff was injured through Lawrence, the engineer, falling asleep at his post.

It was contended for the defendants, upon the authority of *Wiggett* v. *Fox* (1) and *Murray* v. *Currie* (2), that they were not responsible for the negligence of the engineer, he being under the

(1) 11 Ex. 832. (2) Law Rep. 6 C. P. 24.

control of Whittle the contractor, and in no way under their control; and that, the injury being the result of the negligence of a fellow-workman, the plaintiff was without remedy against the common employer.

A verdict was found for the plaintiff, with 300*l.* damages; leave being reserved to the defendants to move to enter judgment for them if the Court should be of opinion that they were not under the circumstances responsible for the negligence of Lawrence. Pursuant to notice,

May 3. *Herschell, Q.C.*, and *M'Connell*, moved to enter judgment for the defendants. *Wiggett* v. *Fox* (1) and *Murray* v. *Currie* (2) shew that the defendants are not responsible for the injury done to the plaintiff. The person whose negligence caused it was in no sense their servant. The duty which he performed, though performed at their expense, was done under the orders and control of the contractor: consequently, the injury sustained by the plaintiff was the result of the negligence of a fellow-servant or workman, for which the plaintiff has no remedy. "When a man enters into the service of a master, he tacitly agrees to take upon himself to bear all ordinary risks which are incident to his employment, and amongst others the possibility of injury happening to him from the negligent acts of his fellow-servants or workmen," per Archibald, J., in *Lovell* v. *Howell*. (3)

[LORD COLERIDGE, C.J. The question is whether the present case falls within *Wiggett* v. *Fox* (1) or *Abraham* v. *Reynolds*. (4)]

The person guilty of the negligence in *Abraham* v. *Reynolds* (4) was under no duty or obligation to obey the defendants' orders.

L. Temple, Q.C., and *Gully*, shewed cause. The plaintiff and the driver of the engine were not engaged in a common employment: the defendants had no control over the plaintiff; they had over their engine-driver, and might dismiss him. *Warburton* v. *Great Western Ry. Co.* (5) is directly in point. There, the plaintiff was a porter in the employment of the London and North Western

(1) 11 Ex. 832. 2 J. & H. 555
(2) Law Rep. 6 C. P. 24.
(3) Ante, p. 167.
(4) 5 H. & N. 143.
(5) Law Rep. 2 Ex. 30.

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Railway Company at their Manchester station. The defendants also used that station, and their servants whilst within the station were subject to the rules of the London and North Western Railway Company, and to the control of their station-master. The plaintiff, whilst engaged in his usual employment in the station, was injured by the negligence of the defendants' engine-driver, in shunting a train without signal. And it was held that the plaintiff and the defendants' engine-driver were not fellow-servants, and consequently that the defendants were liable. *Abraham* v. *Reynolds* (1) was cited there; and *Wiggett* v. *Fox* (2) was fully discussed and distinguished by the Court.

[LORD COLERIDGE, C.J. Lawrence, the engine-driver, was under the control of Whittle. Was not his negligence one of the risks which Whittle's other servants took upon themselves?]

It will be extremely dangerous to apply the doctrine in *Wiggett* v. *Fox* (2) to a case the facts of which are essentially different.

Herschell, Q.C., in reply. In *Wiggett* v. *Fox* (2), the defendants had no power to dismiss the person whose negligence caused the accident; here, the defendants had. In *Warburton* v. *Great Western Ry. Co.* (3), the two men were employed on different works: the station-master had no control over either except in reference to the rules for the management of the station.

LORD COLERIDGE, C.J. I am of opinion that the defendants in this case are entitled to succeed, and that judgment should be entered for them. The case raises a question which it is always difficult to deal with, though the principles upon which it depends are well established. The doubt arises from the difficulty of ascertaining whether the facts bring the case within one or other of two well-defined rules. The facts in the present case are these:—The defendants are the proprietors of a coal-mine, and had been sinking a shaft themselves; but ultimately they entered into a contract with one Whittle to continue the work. The plaintiff, who up to that time had been employed by the defendants, then became the servant of Whittle, and was paid wages by him. The injury sustained by the plaintiff arose from the negli-

(1) 5 H. & N. 143. (2) 11 Ex. 832.
(3) Law Rep. 2 Ex. 30.

gence of one Lawrence, an engineer appointed by the defendants to work a steam-engine which under their contract with Whittle was provided by the defendants to facilitate the work. Lawrence, though employed and paid by the defendants, was with the engine placed under the sole orders and control of Whittle. If under these circumstances the plaintiff and Lawrence were both in the employ of Whittle, the plaintiff is, upon the principle laid down in *Priestly* v. *Fowler* (1) and several subsequent cases, debarred of remedy against the defendants. If Lawrence was not in Whittle's employ, then the defendants are liable. Now, what was Lawrence's position? He was an engineer employed to do something that was necessary to the sinking of the pit. He was originally, and may be now, in the employ of the defendants: but the work he had to do at the time of the accident was a necessary part of the work to be done under Whittle's contract. He was at that time working under the direction of Whittle, the working of the engine being a part of one operation the whole of which was being done by Whittle. The plaintiff therefore was clearly the servant of Whittle, and Lawrence also was in one sense the servant of Whittle, inasmuch as he was working under his orders and subject to his control, although his wages were paid by the defendants. If so, it seems to me that the defendants are not liable. The principle upon which the non-liability of a master for an injury sustained by a servant or workman in his employ through the negligence of a fellow-servant or workman rests is this, that, when a man enters upon an employment in the carrying on of which several others are engaged with him, he tacitly agrees to accept the employment subject to all the ordinary risks attending it; one of those risks being the possibility of an injury happening to him from the negligence of those who are engaged with him. I cannot conceive a risk falling more expressly within that definition than the present. The plaintiff must have known that the work above ground might be done negligently, and that those who were working below were liable to suffer injury therefrom. I think the case falls distinctly within *Priestly* v. *Fowler* (1) and the class of cases in which that doctrine has been followed. This being the principle and these the facts which to my mind bring this case within

(1) 3 M. & W. 1.

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it, it would be enough to stop there. Practically and substantially the case is undistinguishable from *Wiggett* v. *Fox* (1) and *Murray* v. *Currie*. (2) In both those cases, in a certain sense the person by whom the injury was done was not in the employ of the defendant, yet the Courts held that for all practical purposes there was community of employment of both the plaintiff and the person whose negligence caused the injury. The case with which we have been most pressed by the learned counsel for the plaintiff is *Abraham* v. *Reynolds*. (3) I must admit that it is very difficult upon the facts of that case to distinguish it from the cases to which it is opposed. The Court did, however, distinguish them: but whether or not the facts warranted it is another question. The Court thought there was no community of employment between the injured person and the servant of the defendants who caused the injury. The difficulty of this case is that the person injured and the person whose negligence caused the injury were both in the service or under the orders and control of the contractor, and each acting in the performance of a necessary part of the joint operation. The facts seem to me to be more within the principle of *Wiggett* v. *Fox* (1) than the judges in *Abraham* v. *Reynolds* (3) thought the facts there. Upon the authority, therefore, of *Wiggett* v. *Fox* (1) and *Murray* v. *Currie* (2), I am of opinion that the defendants in this case are entitled to judgment.

ARCHIBALD, J. I am of the same opinion. The question is whether the facts bring this case within the principle of *Priestly* v. *Fowler* (4) and those cases which have followed it. The rule there laid is founded in good sense and general convenience, and we are bound to give effect to it. The facts are these:—The plaintiff was in the employ of Whittle, a contractor engaged by the defendants to sink a shaft. In doing the work under that contract, Whittle was to have steam-power provided for him by the defendants. Lawrence, the man who drove the engine, though paid by the defendants, was assigned to Whittle for the purpose of lowering and raising the workmen and materials, and was under the sole control of Whittle; and it was through the negligence of

(1) 11 Ex. 832.
(2) Law Rep. 6 C. P. 24.
(3) 5 H. & N. 143.
(4) 3 M. & W. 1.

Lawrence that the accident happened to the plaintiff. The real question is whether Lawrence was in the service of Whittle or in that of the defendants. For this purpose, I think he was in the service of Whittle. The injured person and the person whose negligence caused the injury were therefore engaged in one common employment, and the case falls within the principle of *Priestly* v. *Fowler*. (1) In *Abraham* v. *Reynolds* (2), the Court of Exchequer seemed to think that the facts did not shew a common employment. The resemblance between that case and the present, I must admit, is very striking: but I can come to no other conclusion than that this was a case of community of employment, and that in its facts it is much more like *Wiggett* v. *Fox* (3) and *Murray* v. *Currie* (4), than it is like *Abraham* v. *Reynolds*. (2) I think Lawrence was in the employ of Whittle, and not of the defendants.

LINDLEY, J. I am of the same opinion. When the cases are examined, it will be found that the principle of *Priestly* v. *Fowler* (1) has been gradually extended to cases the facts of which are not quite similar to those of that case. It was somewhat extended in *Wiggett* v. *Fox* (3), and still further in *Murray* v. *Currie*. (4) The true principle is well stated by my Brother Archibald in *Lovell* v. *Howell*. (5) The real difficulty here is in dealing with the case of *Abraham* v. *Reynolds*. (2) I must confess I should have thought that that case might have been decided differently: but the principle upon which the Court there profess to decide does not differ from that laid down in *Priestly* v. *Fowler*. (1) The inference which the Court drew from the facts there was that the plaintiff was in no sense in the employ of the defendants. In *Warburton* v. *Great Western Ry. Co.* (6), no such difficulty presented itself: there was no community of employment; though it is true that both the party injured and the person whose negligence occasioned the injury were both bound to obey the station-master in all things relating to the regulation of the station. It comes therefore to this, that we feel ourselves unable to distin-

(1) 3 M. & W. 1.
(2) 5 H. & N. 143.
(3) 11 Ex. 832.
(4) Law Rep. 6 C. P. 24.
(5) Ante, at p. 167.
(6) Law Rep. 2 Ex. 30.

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guish the present case from *Priestly* v. *Fowler* (1), as extended by *Wiggett* v. *Fox* (2) and *Murray* v. *Currie.* (3)

Judgment for the defendants.

June 26. The plaintiff having appealed against this decision,

Finlay, for the defendants, applied to the Court of Appeal to order the plaintiff to give security for the costs of the appeal in the event of his appeal being unsuccessful. He produced an affidavit shewing that the plaintiff was out of employment and without visible means of support.

Gully, for the plaintiff, submitted that, to require security would be a denial of justice to the injured man; and that, inasmuch as *Wiggett* v. *Fox* (2), the case mainly relied on to sustain the judgment of the Court below, had never been discussed in a Court of Error, the plaintiff ought not to be deprived of the opportunity of doing so on the present occasion.

PER CURIAM (James and Mellish, L.JJ., Baggallay, J.A., and Quain, J.): Under the circumstances, we think the appeal ought to be heard without calling on the plaintiff to give security for costs.

Solicitors for plaintiff: *Torr, Janeway, Tagart, & Co., for Edwin Hughes, Liverpool.*

Solicitors for defendants: *Gregory & Co., for A. S. Mather, Liverpool, and Scott & Ellis, Wigan.*

(1) 3 M. & W. 1. (2) 11 Ex. 832.
(3) Law Rep. 6 C. P. 24.

[IN THE COURT OF APPEAL.]

1876
Aug. 8.

SLOMAN AND OTHERS *v.* THE GOVERNOR AND GOVERNMENT OF NEW ZEALAND.

Practice—Substituted Service—Colonial Government—Corporation—Judicature Act, 1875, *Order IX., Rule* 2.

Where effectual personal service of a writ could not be made on the persons named as defendants, the Court would not order substituted service to be made.

A colonial government is not a corporation and cannot be effectually served with a writ.

THE writ in this case was issued from the Common Pleas Division, and in it R. M. Sloman & Co. were named as the plaintiffs, and the governor of the colony of New Zealand and Isaac Earl Featherston as the defendants; and by amendment the governor and government of the colony of New Zealand were named as the defendants.

The plaintiffs claimed 25,000*l.* damages for breach of two contracts. These contracts bore date the 14th of May, 1874, and purported to be made between Her Majesty the Queen for and on behalf of the colony of New Zealand of the first part, Isaac Earl Featherston, of Victoria Street, Westminster, the agent-general in England for the government of New Zealand, of the second part, and R. M. Sloman and F. L. Loesner of the third part, and were for the conveyance by Sloman & Co. of emigrants to New Zealand. Sloman and Co. carried on business at Hamburgh, where the contracts were executed.

By a New Zealand Act, 35 Vict. c. 49, it was enacted that, when any person had any claim or demand against Her Majesty the Queen which might arise or accrue after the first day of January, 1872, within the colony of New Zealand, it should be lawful for such person to present a petition, as therein mentioned, being in fact a petition of right. And by another Act it was provided that all contracts for the conveyance of emigrants should be made in the name of the Queen.

The plaintiffs obtained summonses on I. E. Featherston and on John Mackrell to appear and shew cause why, upon service of the writ upon I. E. Featherston or upon John Mackrell, the plaintiffs

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should not be at liberty to proceed with the action. The summons upon I. E. Featherston was apparently abandoned, but that on J. Mackrell came before the Common Pleas Division.

July 17. *J. C. Mathew*, for the plaintiffs.

Day, Q.C., for Mr. Mackrell, admitted that he was usually solicitor for the colony of New Zealand, but said that he had no authority to appear and defend this action.

1 C. .

PER CURIAM (Lord Coleridge, C.J., and Archibald, J.): In this case, without saying what the result of these proceedings may be, and without being supposed to intimate an opinion favourable or unfavourable to the plaintiffs as to what the ultimate result may be, we think it far too important a matter to be settled in this form of application and at this stage of the proceedings. Therefore, at their peril the plaintiffs may have an order.

The order made was, that the plaintiffs "be at liberty to proceed upon such substituted service of writ herein directed to the governor and government of the colony of New Zealand upon the said John Mackrell."

Mr. Mackrell, by way of appeal, moved to discharge the order so far as it directed service on him to be substituted.

C. P. D.

Aug. 8. *Edwyn Jones* (*Benjamin, Q.C.*, with him), for the appellant. The defendants named in the writ are not a corporation and cannot be served or sued, consequently no order can be made for substituted service. If the plaintiffs think they can succeed, let them obtain leave to serve the defendants. Substituted service is only under Order IX., Rule 2, to enable plaintiffs to have relief more promptly, not to relieve them from any difficulty in pleading. The contract was entered into with the Queen, and, as in England, the remedy would be by petition of right. No doubt it is probable that the plaintiffs could not obtain any relief in this action, but Mr. Mackrell ought not to be placed in such a difficult position. Is he to defend without instructions and for non-existing defendants; or is he to allow judgment to go by default and run the risk of an action for damages if the plaintiffs should prove to be right?

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Watkin Williams, Q.C., for the plaintiffs. The Court will not decide this important question on a preliminary objection like this. If the plaintiffs have made a mistake they will suffer, but let the question be properly tried and let the defendants move to discharge the order. The contract, no doubt, is in the name of the Queen, but it is for the government of New Zealand which chooses to make its contracts in that form, and the plaintiffs ought to be allowed to shew this if they can. If they fail they will have to pay the costs. The New Zealand Acts as to petitions of right apply to contracts in the colony only, and under them the plaintiffs would have no remedy.

JAMES, L.J. With all due deference to the opinion of the Common Pleas Division, it appears to me that we must deal with this question on the present application, and that no good can arise from reserving it for solemn argument on some proceeding which may be taken when something has been done which is called substituted service.

When an order for substituted service is made, there ought to be some person or persons, or body corporate, on whom there could be original service. There is here no body politic residing in England, or having a place of business in England, called the governor and government of the colony of New Zealand, therefore the plaintiffs could not have original service here. The only case here for original service is against somebody or something in New Zealand, and the plaintiffs must get an order for service in New Zealand, treating him or it as something existing. But if they take the writ to New Zealand to serve it there, they would have the same difficulty in finding out who is to be served. What is the thing called the governor and government of the colony of New Zealand? It appears to me that, if this can be done, you might as well make the president and government of the United States or the Emperor of Russia defendants, and get an order for substituted service on the ambassador here, because the defendants cannot be served properly in this country. There might be some difficulty in suing sovereign bodies, or bodies quasi sovereign, such as a colonial government, but we cannot have substituted service on somebody representing something which does not exist. There is

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an individual who for the time being is the governor of New Zealand; there are certain persons carrying on the government; there are probably a secretary, and a treasurer, and an attorney-general and others, and there are the members of the representative assembly and council who constitute the legislature; but to call them a corporation seems an abuse of language. We must take notice that there is no such corporation as a governor and government of New Zealand, and I think we ought not to allow substituted service on some individual, on the ground that he is a representative of them in this country.

MELLISH, L.J. I am of the same opinion. The Common Pleas Division has not decided that an action can be maintained against the governor and government of New Zealand, and they seem to have thought it extremely doubtful whether such an action can be maintained, but they are of opinion that the question ought not to be decided on the present application. I am of opinion that it ought to be and must be decided on the present application. If we allow substituted service to go, and the governor and government do not appear, then judgment will be given, and I cannot think it right to allow the judgment of the High Court of Judicature to be given against such a body as the governor and government of New Zealand, unless the Court sees that they are a body liable to be sued in this Court.

Before we determine whether we should allow substituted service, it is for us to determine whether we ought to allow direct service. Unquestionably the governor and government of New Zealand are not within the ordinary jurisdiction of the High Court. It would be a writ primâ facie to be served abroad, and before we consider whether we should allow substituted service, it is well to consider whether it would be possible or right to issue a writ to be sent out to New Zealand to be actually served on the governor and government of New Zealand in a matter relating to New Zealand.

It is an admitted fact that the contract was made in the name of the Queen. By an Act of the New Zealand legislature they have enacted that all contracts relating to immigration shall be made in the name of the Queen. Messrs. Sloman, or any other

person who entered into the contract, had perfect notice that they were entering into a contract in the name of the Queen. It is perfectly well known, as a proposition of law, that with regard to contracts entered into in the name of the Queen and by the Queen there is no remedy except by petition of right. If a contract is made by the Queen, you cannot sue a ministerial officer who enters into that contract by his own name. If he did anything illegal, he would possibly be liable to be sued for his illegal acts; but I cannot understand how such an action as this can possibly lie, or how the governor and government can be made to appear.

The secretary of state for India has been made a corporation sole, and for some purposes other secretaries of state have been made corporations sole. It is said that these New Zealand Acts have made the governor a corporation sole; but I have great doubt whether any colonial Act could make him a corporation sole. But if they have done so, it is plain that the colonial legislature never intended that these contracts should be made in the name of the governor, so that the governor, as a corporation sole, should be liable to be sued on them. They are to be made in the name of the Queen for the express purpose of preventing actions from being brought on them, and that the legislature may have the power to determine how the money of New Zealand shall be expended. That being so, in my opinion it would not be right to try and compel the governor to come in and defend. What I am afraid of is, that we should enable the plaintiffs to get a judgment against the governor and government, who might be advised not to appear, as it would be against their dignity to appear, and a judgment would be obtained which could not be enforced; and that would tend to bring the jurisdiction of the High Court into contempt, and this we ought not to allow if we can by any means prevent it.

BAGGALLAY, J.A. I am of the same opinion. Under Order IX., Rule 2, the plaintiff can have substituted service only if he is from any cause unable to effect prompt personal service. That is in cases in which there could be (if there were not difficulties in the way) personal service. But it never was intended to give a power of obtaining substituted service simply and solely because the plaintiff did not know how to describe the parties he sought

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to sue. That is the case here. I do not see how any personal service, according to the rules of service, could be effected on such defendants as the governor and government of the colony of New Zealand. If no personal service could be effected on defendants so described, it appears equally impossible for the Court to allow substituted service.

It appears in this case that, not being able to serve those whom they desire to sue as defendants, the plaintiffs endeavour to get substituted service on a gentleman whom they happen to find in the city of London.

Order discharged with costs.

Solicitors for plaintiffs: *Parker & Clarke.*
Solicitor for Mr. Mackrell: *J. Mackrell.*

May 29.

MACCORD *v.* OSBORNE.

Infant—Ratification of Promise after attaining full Age—9 *Geo.* 4, *c.* 14, *s.* 5.

A recognition when of full age of a debt contracted in infancy, and a promise to pay it "as a debt of honor" when of ability, is not such "a ratification of the contract made during infancy" as is required by 9 Geo. 4, c. 14, s. 5, to charge the party.

THE statement of claim was as follows:—

1. The defendant is a gentleman of property, the son of Mr. Edward Baldwin and Mrs. Rebecca Osborne Baldwin. The plaintiff is the sister of Mrs. Rebecca Osborne Baldwin.

2. In the year 1861, the plaintiff at the request of the defendant paid to Mr. and Mrs. Baldwin the sum of 200*l.* to assist them in purchasing furniture for a house, and for the re-payment thereof took, among other things, a bill of sale or security upon the furniture from Mr. and Mrs. Baldwin.

3. In the year 1863, the defendant requested the plaintiff to give up her bill of sale or security, in order to enable further money to be raised elsewhere by Mr. and Mrs. Baldwin on the furniture. The plaintiff agreed to do so, provided the defendant would guarantee the re-payment of the 200*l.* The defendant thereupon gave the plaintiff an I. O. U. for the 200*l.*, signed by

Mr. and Mrs. Baldwin, and a memorandum of guarantee upon it signed by himself together with Mr. Barry Baldwin, his brother.

4. The I. O. U. and guarantee were as follows:—

We I. O. U. two hundred pounds. London, May 4th, 1863.

Edward Baldwin.

To Miss Maccord. Rebecca Osborne Baldwin.

Should the above not be paid by my parents, we agree to pay it when we shall be able to do so. Witness our hand subscribed. Dated 4th May, 1863.

Barry Baldwin.

Edward S. Baldwin.

The said Edward S. Baldwin is the present defendant, who has assumed the name of Osborne in consequence of having inherited property from an uncle.

5. The parents of the defendant are and always have been unable to discharge the debt.

6. In or about April, 1871, the plaintiff requested payment from the defendant. Thereupon the defendant wrote the following memorandum on the document mentioned in paragraph 4:—

I promise to pay the above as a debt of honor, whenever I may be in a position to pay the same, to Miss Emily Maccord, providing she be living at such time, with interest at the rate of 5 per cent. on the whole sum from due date to payment.

17 April, 1871. E. S. Baldwin.

7. Since the year 1863 the defendant has paid to the plaintiff at various times interest on the 200*l.*, amounting in all to less than 10*l.* The plaintiff is unable to give particulars of these payments of interest or of their dates, further than are contained in the amended reply and joinder in demurrer.

8. Save as aforesaid, the said sum of 200*l.* and interest is still due and unpaid.

9. The defendant is in a position to pay the same, and able to do so.

Claim "200*l.* due as aforesaid," and "interest thereon at 5 per cent. as per memorandum of 17th April, 1871, till judgment."

Statement of defence:—

1. The defendant does not admit any of the allegations in the plaintiff's statement of claim, except those contained in the first and the last paragraphs thereof.

2. In the years 1861 and 1863 the defendant was an infant

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within the age of twenty-one years, having been born on the 2nd of May, 1843.

3. The defendant submits that the memorandum alleged in the sixth paragraph of the plaintiff's statement of claim to have been written by the defendant (which the defendant does not admit) is not a promise or ratification such as renders him liable to pay the debt claimed in the action, and submits that he never was at any time liable to pay the same.

4. The defendant further says that the alleged cause of action did not accrue within six years before this suit, and that he never paid any sum by way of interest on the debt claimed in this action or otherwise acknowledged the alleged debt as a debt for which he was legally liable to the plaintiff.

Amended reply. The defendant did, in or about April, 1871, on a day of which the plaintiff is unable to give further particulars, pay the sum of 5*l.* on account of interest and of the principal of the said debt, in answer to an application for money on account of the said debt then made by the plaintiff. Issue thereon.

The defendant also demurred to the statement of claim. Joinder. (1)

Lord, in support of the demurrer. The question is whether the letter of the 17th of April, 1871, is a ratification by the defendant of a promise made by him during his infancy. Now, the expression "debt of honor" has a known meaning,—as, a debt contracted in a gambling or betting transaction,—and it was evidently written by the defendant with reference to the sense in which it is ordinarily understood. The 9 Geo. 4, c. 14, s. 5, enacts that "no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith." In *Rowe* v. *Hopwood* (2), goods having been supplied by the plaintiff to the defendant whilst the latter

(1) By arrangement the second paragraph of the statement of defence was to be read with the statement of claim, upon the argument of the demurrer.

(2) Law Rep. 4 Q. B. 1.

was an infant, when he came of age an account with the items and prices was submitted to him, at the foot of which he signed the following, "Particulars of account to the end of 1867, amounting to 162*l.* 11*s.* 6*d.*, I certify to be correct and satisfactory;" and this was held not to amount to a recognition of the debt as an existing liability, so as to be a ratification of the contract within the statute. "In order," says Cockburn, C.J., "to be a ratification, there must be a recognition by the debtor after he attained his majority of the debt as a debt binding upon him. There ought to be at least on the part of the debtor an admission of an existing liability, and we ought not to strain the meaning of the words in the document signed by the debtor so as to defeat the operation of the statute passed for his protection."

[BRETT, J. To amount to a ratification, it must be an express promise, or an acknowledgment of an existing liability from which a promise is necessarily to be implied.]

In *Mawson* v. *Blane* (1), Parke, B., says: "The term 'ratification' has already received an interpretation in the case of *Harris* v. *Wall* (2), where it was held to mean such a ratification as would make a person liable as principal for an act done by another in his name. It seems to me that the meaning of 'ratification' is something different from 'promise.' It is an admission that the party is *liable and bound* to pay the debt arising from a contract which he made when an infant. Therefore, in order to bring this case within the 9 Geo. 4, c. 14, there must be an admission in writing by the defendant that he was liable to pay on that contract which he made when a minor, that is, that he was liable and bound in præsenti to pay the acceptance." And Alderson, B., said: "The defendant did not intend by this letter to make himself any more liable than he was before. He was not liable before as acceptor, because when he accepted the bill he was an infant. I think also that the defendant meant to consider himself bound in honor to pay the bill, if the drawer did not."

C. S. C. Bowen, contrà. Looking at the facts disclosed here and at the document itself, it is plain that the defendant, if he meant anything, meant to make himself liable for this debt. It is a debt which he believed himself bound in honor to pay; and he promises to pay it. The statute, it is true, requires a ratification or an

(1) 10 Ex. 206, 210; 23 L. J. (Ex.) 342. (2) 1 Ex. 122.

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express promise. This is an acknowledgment from which a promise to pay is necessarily to be implied.

[GROVE, J. To satisfy the statute, it must be an enforceable promise, not a mere recognition of the debt.]

Any written instrument signed by the party, which in the case of adults would have amounted to the adoption of the act of a party acting as agent, will, in the case of an infant who has attained his majority, amount to a ratification: *Harris* v. *Wall.* (1)

BRETT, J. Looking to the doctrine laid down in *Rowe* v. *Hopwood* (2), it is obvious that this is not a document upon which the plaintiff can rely as a ratification or promise within 9 Geo. 4, c. 14, s. 5. To amount to that, it must be a recognition by the party after attaining twenty-one of the debt as a debt binding on him. It must be a statement in writing to this effect,—I take this upon me as an existing liability. Does the letter of the 17th of April, 1871, amount to that? I am of opinion that it does not. It is not right to say that a judge is to affect not to know what every body else knows,—the ordinary use of the English language. We do know that there is a place where the expression "debt of honor" has a very significant meaning, and where it is used to distinguish between a debt which can and one which cannot be legally enforced. There is no reason why we should adopt any extreme refinement here. When a man writes "I promise to pay the above as a debt of honor," he does not mean to admit that it is a debt which may be enforced against him at law. I am clearly of opinion that this action cannot be maintained.

GROVE, J. I am of the same opinion. The only natural sense of this document is, I promise to pay this as a debt of honor when of ability, but I do not acknowledge it to be a debt for which I am legally liable. Mr. Bowen's argument would strike "as a debt of honor" out of the letter altogether.

DENMAN, J., concurred.

Judgment for the defendant.

Solicitors for plaintiff: *Freshfields & Williams.*
Solicitor for defendant: *O. Leefe.*

(1) 1 Ex. 122. (2) Law Rep. 4 Q. B. 1.

[IN THE COURT OF APPEAL.]

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Aug. 7.

BATSON *v.* NEWMAN.

Wager—Contribution towards Prize to be awarded to Winner—8 & 9 *Vict.* c. 109, s. 18.

H. and B. deposited 50*l.* each with N., and entered into a written agreement that the 100*l.* should be paid to H. if his horse trotted eighteen miles in an hour, and if not, then to B. The referee decided that the horse did trot the distance within the hour. B. demanded his 50*l.* back from N. before the money had been paid over to H.:—

Held, affirming the decision of the Common Pleas Division, that B. was entitled to recover his stake back from N., for that the transaction was simply a wager, and did not come within the proviso in 8 & 9 Vict. c. 109, s. 18, as to contributions to a prize, or sum of money to be awarded to the winner of any lawful game, sport, pastime, or exercise.

2 Ex D. 424
425, 7

THIS was an appeal from a decision of the Common Pleas Division refusing an order nisi to enter a verdict for the defendant.

On the 17th of August, 1875, the plaintiff and John Hawkins entered into the following agreement:—

"An agreement made this 17th day of August, 1875, between John Hawkins, of, &c, and John Batson, of, &c.

"The said John Hawkins wagers the amount of 50*l.* that his horse Jack trots eighteen miles in one hour, within the space of three weeks to one month from this date. The said John Batson wagers the said sum of 50*l.* that the said horse will not do so.

"The said horse is to trot between Lichfield and Derby, Mr. Hawkins to have choice of way. The horse to be on the mark at two o'clock on the day on which the wager is to be decided. The said John Hawkins to give three days' clear notice to the said John Batson before the wager is decided; such notice to be sent by registered letter by post.

"In case of any dispute, the decision of Mr. Robert Owen (the referee agreed to between both parties) shall be final, and there shall be no appeal from his decision. The expenses of the referee shall be paid out of the stakes. The amount of 100*l.* is now in the hands of Mr. Joseph Newman, the stakeholder, and such amount is to be paid by him to either the said John Hawkins or the said John Batson, as the referee may direct. The referee to be time-keeper.

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"If either party do not comply with this agreement, the amount deposited by him with the stakeholder to be forfeited."

On the 17th of September the trotting came off, and the referee certified that the horse had trotted the eighteen miles within the hour. The defendant, who was stakeholder, accordingly paid over the 100*l.* to Hawkins.

The plaintiff, in September, 1875, commenced an action for the whole 100*l.*, but subsequently, by leave, amended his writ by adding a claim for 50*l.*, one moiety of the 100*l.*

At the trial before Coleridge, C.J., the defendant admitted that before he paid over the stakes to Hawkins the plaintiff had asked to have his 50*l.* back. A verdict was taken for the plaintiff for 50*l.*, execution being stayed that the defendant might move. He accordingly moved for an order nisi to enter a verdict for him, which was refused on the ground that the case was governed by *Varney* v. *Hickman* (1) and *Aubert* v. *Walsh* (2), and did not come within the proviso in 8 & 9 Vict. c. 109, s. 18 (3), nor within the authority of *Batty* v. *Marriott.* (4)

Aug. 7. *Maurice Powell*, for the defendant, renewed his motion before the Court of Appeal. The question is whether this transaction comes within the proviso in 8 & 9 Vict. c. 109, s. 18, and it is submitted that it does, for that the stakes were contributions to a "sum of money to be awarded to the winner of a lawful sport, pastime, or exercise." *Batty* v. *Marriott* (4) is in point. If it is a race, *Evans* v. *Pratt* (5) shews that it is legal, but it comes under the head of "pastime," rather than of "race."

[MELLISH, L.J. How could there be a "winner" here? Does not the word import competition between two or more?]

(1) 5 C. B. 271.

(2) 3 Taunt. 277.

(3) 8 & 9 Vict. c. 109, s. 18: "All contracts or agreements, whether by parol or in writing, by way of gaming or wagering shall be null and void, and no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made." Proviso, "that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise."

(4) 5 C. B. 818.

(5) 3 M. & G. 759.

[*Brown* v. *Overbury* (1) was also referred to.]

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JAMES, L.J. I am clearly of opinion that this transaction is a bet and nothing else, and does not come within the proviso in 8 & 9 Vict. c. 109, s. 18. There was not, in my opinion, any contribution to a prize or sum of money to be awarded to a winner.

MELLISH, L.J. I am of the same opinion. The Court of Common Pleas, in *Batty* v. *Marriott* (2), after some hesitation held that a case where only two persons contributed came within the proviso. We are asked to go further, and to decide that a case where only one person is to do anything comes within it. There can only be a winner when two or more persons are to compete in doing something. Here nobody but Hawkins was to do anything, and the case is simply one of wagering.

BAGGALLAY, J.A., concurred.

Appeal dismissed.

Solicitors for defendant: *J. & F. Needham.*

[IN THE COURT OF APPEAL.]

July 24.

JUSTICE *v.* THE MERSEY STEEL AND IRON COMPANY.

Practice—Appeal to House of Lords—Staying Execution pending Appeal—Bail in Error—Extending Time—Judicature Act, 1875 (38 & 39 *Vict. c.* 77), *ss.* 2, 21—*Rules of Supreme Court, Order LVIII., Rules* 1, 16—*Common Law Procedure Act*, 1852, *ss.* 151, 155.

The practice with regard to appeals to the House of Lords is unaltered by the Judicature Acts and Rules.

Therefore, on an appeal from a decision of the Court of Appeal in an action attached to one of the Common Law Divisions of the High Court, the appellant cannot obtain a stay of execution of the judgment pending the appeal, unless he gives bail in error, as provided by the Common Law Procedure Act, 1852, s. 151; and on doing that he is entitled to a stay of execution as a matter of right.

An application to enlarge the time for giving bail in error must be made, not to the Court of Appeal, but to that Division of the High Court to which the action is attached.

THIS action was commenced in the Court of Common Pleas in October, 1873. At the trial, in December, 1873, it was referred

(1) 11 Ex. 715. (2) 5 C. B. 818.

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to an arbitrator to state a special case for the opinion of the Court. On the 18th of November, 1875, a Divisional Court of the Common Pleas Division gave judgment for the defendants. On the 23rd of June, 1876, the Court of Appeal reversed this decision and directed judgment to be entered for the plaintiffs for 4500*l.* and costs. On the 27th of June the defendants served a notice of appeal to the House of Lords. On the 30th of June the plaintiffs entered up judgment for 4500*l.*; and on the 4th of July they delivered their bill of costs for taxation, and on the 20th of July the master gave his allocatur for the costs. On the 21st of July the plaintiffs delivered a writ of fi. fa. for the 4500*l.* and costs to the sheriffs' London agent. On the 13th of July the defendants had taken out a summons in chambers to shew cause why execution should not be stayed pending the appeal to the House of Lords. The summons was heard by a master on the 20th of July, and he refused to make any order thereon. On the 22nd of July the defendants applied ex parte to the Court of Appeal for an order to stay execution pending the appeal to the House of Lords.

Lanyon, for the defendants. The plaintiffs are in a position to issue execution at once, and they reside in America. If the judgment should be reversed on appeal, the defendants may never get their money back again. The petition of appeal will be lodged to-day, or on Monday, the 24th instant.

[MELLISH, L.J. There appears to be nothing in the Judicature Acts or the rules to alter the proceedings upon an appeal to the House of Lords. Formerly, on an appeal from a judgment of the Exchequer Chamber there was no stay of execution unless bail in error was given. If bail in error was given, execution was stayed as a matter of right. On appeals from the Court of Chancery it was necessary to make a special application to that Court for a stay of execution, but that was not so upon appeals from the Common Law Courts. Why should the defendants not give bail in error now?]

Proceedings in error are now abolished by Order LVIII., Rule 2.

[MELLISH, L.J. That is as between the High Court and the

Court of Appeal, not as between the Court of Appeal and the House of Lords.

BAGGALLAY, J.A. Sects. 2 and 21 of the Act of 1875 appear to preserve the old practice with regard to appeals to the House of Lords.]

Order LVIII., Rule 16, enables the Court of Appeal to stay execution pending an appeal.

[MELLISH, L.J. That rule only applies to appeals from the High Court to the Court of Appeal.]

JAMES, L.J. We cannot decide the question on an ex parte application. We will give the defendants leave to renew their motion upon notice on Monday, the 24th instant.

July 24. The application was renewed upon notice.

Lanyon, for the defendants. It would seem that the old practice with regard to appeals to the House of Lords remains unaltered.

[MELLISH, L.J. If that be so, we ought not to interfere. The Exchequer Chamber never did in such cases. The judgment of the Exchequer Chamber became that of the Court from which the case came; and now the judgment of the Court of Appeal becomes that of the High Court.]

The time has expired for giving bail in error, and the defendants ask to have it extended. Sect. 151 of the Common Law Procedure Act, 1852, gives power to enlarge the time.

Bosanquet, for the plaintiffs. The sheriff is already in possession. The defendants are a limited company, and the plaintiff ought not to be deprived of the security he has obtained for payment of his claim. No reason has been shewn for extending the time for giving bail in error, even if the Court has power to do so.

MELLISH, L.J. I think the Divisional Court has power to extend the time. But this Court, having given its judgment on the appeal, has ceased to have seisin of the case; our judgment, when given, becomes the judgment of the High Court, and the matter is remitted to that Court. The application must be made to them. I am not sure that there is any ground for it. It is the

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misfortune of the defendants that they did not know that the old practice remains.

JAMES, L.J., and BAGGALLAY, J.A., concurred.

Application refused with costs.

Solicitors for plaintiff: *Wilkinson & Sons.*
Solicitors for defendants: *Norris, Allens, & Carter.*

April 28.

ARNOLD AND OTHERS *v.* THE CHEQUE BANK.
THE SAME *v.* THE CITY BANK.

Money received by means of a forged Indorsement—Negligence in the Custody or Transmission of Securities by Post—Estoppel—Conversion.

Post 774
3 B.D. 195.
5 C.P.D. 10
15
11 Q.B.D. 779

Negligence in the custody of a draft or in its transmission by post will not disentitle the owner of it to recover the draft or its proceeds from one who has wrongfully obtained possession of it.

Negligence, to amount to an estoppel, must be in the transaction itself, and be the proximate cause of leading the third party into mistake, and also must be the neglect of some duty which is owing to such third party or to the general public.

The plaintiffs, merchants at New York, desiring to transmit 1000*l.* to W. & Co., of Bradford, purchased of S. & Co., in New York, a draft for that amount drawn by S. & Co. on Smith, Payne, & Co., London, payable to the order of the plaintiffs on demand. The plaintiffs indorsed the draft specially to W. & Co. or order, and inclosed it in a letter addressed to them which was placed in a letter-box in their office to be posted in the usual way. The letter was stolen by one Hecht, a clerk in the employ of the plaintiffs, who forged an indorsement of W. & Co., and procured the defendants, bankers in London, to present the draft and obtain the money, which was placed by them to the account of a person acting in concert with Hecht, upon whose cheques the money was almost immediately drawn out.

In an action for money had and received, the defendants, in order to shew that the negligence of the plaintiffs in the custody and transmission of the draft afforded facilities for the fraud, and so estopped them from suing for the money, tendered evidence that it was an usual and almost invariable practice amongst merchants sending large remittances from abroad to send, besides the letter containing the remittance, a letter of advice by the same or the next mail. This evidence was rejected, on the ground that the alleged negligence was collateral only to the transaction giving rise to the action:—

Held, that the plaintiffs' right to the draft, and to sue for the proceeds thereof in the hands of the defendants as money received to their use, was not affected by the felonious act of Hecht; and that the evidence tendered was properly rejected.

THESE were actions for money had and received brought by the plaintiffs to recover from the defendants respectively the proceeds

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of two drafts for 1000*l.* each, upon the ground that they were received by the respective defendants under circumstances which in point of law made them moneys received to the use of the plaintiffs.

The two cases were tried together before Lord Coleridge, C.J., at the London sittings after Trinity Term, 1875. The facts which were proved in *Arnold* v. *Cheque Bank* are fully set out in the judgment.

In *Arnold* v. *City Bank* the bill was drawn by Stewart & Co., of New York, upon Smith, Payne, & Smith, bankers in London, and was made payable to the order of D. H. Arnold & Co., on demand, and was specially indorsed by D. H. Arnold & Co. to Firth, Boon, & Co., of Bradford. Stewart & Co. had funds in the hands of Smith, Payne, & Co. sufficient to meet both drafts.

On the 11th of September, 1874, an hotel-keeper who was a customer of the Tottenham Court Road branch of the City Bank introduced to the manager a person who wished to open an account there. This person tendered the draft for 1000*l.*, which had on it a forged indorsement purporting to be by Firth, Boon, & Co., and himself indorsed it with the name of "Adolphus Hornby." The manager caused the bill to be presented at Smith, Payne, & Smith's, and obtained the money for it, which he entered to the credit of Adolphus Hornby, who drew out substantially the whole of it in two or three days. In all other respects the two cases were similar in their circumstances, and in each a verdict was directed to be entered for the plaintiffs.

Nov. 9. *Sir H. James, Q.C.*, obtained in each case an order nisi for a new trial on the ground of the improper rejection of evidence of the plaintiffs' neglect of the ordinary usage of merchants; and for misdirection in directing a verdict to be entered for the plaintiffs, because the money claimed in the action was not the plaintiffs' money, and the defendants had been guilty of no wrongful conversion, and had received no money to the use of the plaintiffs; and that the plaintiffs were precluded from recovering by reason of their neglect of proper precautions in the custody and dispatch of the drafts.

Feb. 25. *Day, Q.C.*, *Cohen, Q.C.*, and *Finlay*, shewed cause.

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Adolphe Hecht, the person who is supposed to have purloined the letters, having obtained the bills by fraud, and the money having been received by the defendants by means of a forged indorsement, the property in the bills never passed from the plaintiffs, and the proceeds became money received by the defendants to their use. Evidence as to negligence in the custody and transmission of the bills was clearly inadmissible: the negligence to charge the plaintiffs must be negligence in the immediate transaction, and in the performance of some duty to the party who sets up the negligence. It may be that, if Stewart & Co. had been guilty of any negligence, Smith, Payne, & Smith would have had an answer as against them; but there was no negligence here (even if the evidence was admissible) which could estop Arnold & Co. from saying that the bills remained theirs, and that they were entitled to claim the proceeds; for, negligence to create an estoppel must be such as to amount to misrepresentation. There was no negligence on the part of Arnold & Co. which can in a Court of law be considered as the proximate cause of the loss of the money.

[The following cases were referred to:—*Ex parte Swan* (1); *Swan* v. *North British Australasian Co.* (2); *Bank of Ireland* v. *Evans's Charities in Ireland* (3); *Young* v. *Grote* (4), as explained by Parke, B., in *Robarts* v. *Tucker* (5), and by Williams, J., in *Ex parte Swan* (1); *Ingham* v. *Primrose* (6); *Ogden* v. *Benas* (7); *Hollins* v. *Fowler* (8); *Carr* v. *London and North Western Ry. Co.* (9); *Foley* v. *Hill* (10); *Johnston's Case.* (11)]

Feb. 28. *Sir Henry James, Q.C., Benjamin, Q.C.,* and *R. T. Reid,* for the Cheque Bank, in support of the order. There was abundant evidence that the plaintiffs had been guilty of negligence in the custody and transmission of the drafts; and the effect of that evidence was for the jury, and ought not to have been withdrawn from them. The evidence of negligence was substantially this:—It was known to every clerk in the plaintiffs' office that the

(1) 7 C. B. (N.S.) 400; 30 L. J. (C.P.) 113.
(2) 2 H. & C. 175, 181; 32 L. J. (Ex.) 273, 294.
(3) 5 H. L. C. 389.
(4) 4 Bing. 253.
(5) 16 Q. B. 579.
(6) 7 C. B. (N.S.) 82; 28 L. J. (C.P.) 294.
(7) Law Rep. 9 C. P. 513.
(8) Law Rep. 7 H. L. 757.
(9) Law Rep. 10 C. P. 307.
(10) 2 H. L. C. 28.
(11) Law Rep. 6 Ch. 212.

letters containing these drafts were placed for transmission in a letter-box to which all of them had access, and yet no inquiry was made as to whether, or by whom, or when they had been posted; and, although Adolphe Hecht absconded under such suspicious circumstances on the 26th of August and his brother Jacob a few days later, no inquiry seems to have been made after them, nor was any attempt made to stop the negotiation of the drafts until the 6th of October, ten or twelve mails having left New York in the interim. The *Celtic*, by which the letters containing the drafts were intended to go, left New York on the 21st of August. A vessel called the *Bothina*, which sailed from New York on the same day on which Adolphe Hecht absconded, arrived in London on the 6th of September; and the drafts were not presented at Smith, Payne, & Smith's until the 10th and 11th. Arnold & Co. wrote to Williams & Co. on the 26th of August a letter which probably came over by the *Bothnia*, but in which no reference is made to their having transmitted them the draft for 1000*l.* on the 21st. Thus, every opportunity was given for the perpetration of the theft, the escape of the felon, and the obtaining payment of the stolen drafts.

[LORD COLERIDGE, C.J. It would have been for the jury, no doubt, if there was any negligence on the part of the plaintiffs which conduced to the fraud: but I was of opinion that there was none. A man may be more careless with regard to the custody of a thing that can be made available only by means of a forgery than if by mere larceny.]

That seems a startling and novel doctrine. Evidence, moreover, was tendered to shew that it is usual among merchants where bills to large amounts are transmitted by post, to forward a separate letter of advice by the same or another mail. Surely that was fit for the consideration of the jury. It is not contended that negligence in the owner of a chattel prevents him from following it if stolen: but it is submitted that the rule is different in relation to negotiable instruments, which are intended to pass by written transfer, and are created for the purpose of passing from hand to hand. Whenever one of the two innocent persons is to suffer for the fraud of a third, the loss must fall upon him whose negligence has given the opportunity for the commission of the fraud: *Halifax*

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Union (*Guardians*) v. *Wheelwright*. (1) The same doctrine is laid down in *Lickbarrow* v. *Mason* (2), and by several of the judges in *Swan* v. *North British Australasian Co.* (3)

Thesiger, Q.C., and *F. M. White* were with *Sir Henry James, Q.C.*, in *Arnold* v. *City Bank*.

LORD COLERIDGE, C.J. We entertain no doubt in this case; but, as it involves a question of considerable importance, we propose to defer our judgment until a future day.

Cur. adv. vult.

April 28. The judgment of the Court (Lord Coleridge, C.J., and Archibald and Lindley, JJ.), which applied to both cases, was delivered by

LORD COLERIDGE, C.J. In this case the action is brought by the plaintiffs claiming, as the owners of a draft for 1000*l.*, to recover the proceeds from the defendants, on the ground that they were received under circumstances which make such receipt a receipt to the use of the plaintiffs.

The facts, as they appeared before me at the trial, were as follows:—The plaintiffs, merchants at New York, desiring to transmit 1000*l.* in payment to their correspondents, Messrs. E. G. Williams & Co., of Bradford, England, purchased of Stewart & Co., in New York, the draft in question, which was dated the 21st of August, 1874, and drawn by Stewart & Co. on Smith, Payne, & Co., bankers in London, for 1000*l.*, payable to the order of D. H. Arnold & Co., on demand. The plaintiffs having thus obtained the draft, a special indorsement to Messrs. Williams & Co. was written upon it, and it was inclosed by the plaintiffs in a letter to Messrs. Williams & Co. for the purpose of transmission. The letter was then placed, with others, at the office of the plaintiffs, in a box on the outside of which were painted the words "Letter Box," and which was the place in which letters for the post were usually deposited. The envelope was addressed to Messrs. E. G. Williams & Co., Bradford, and had the name *Celtic* written on it, that being the name of the steamer sailing the next day, by which the mail was sent.

(1) Law Rep. 10 Ex. 183.
(2) 2 T. R. 71.
(3) 2 H. & C. 175, 181; 32 L. J. (Ex.) 273.

The duty of taking letters from the box in question and conveying them to the post was performed by one of two clerks in the office of the plaintiffs, named Adolphe Hecht and Jacob Hecht, whichever happened to be disengaged. The letter in which the draft was inclosed was in the following terms:—

"New York, August 21st, 1874.

"Messrs. E. G. Williams & Co., Bradford.

"Dear Sirs,—We hand you herewith No. 2132, first bill of exchange, payable on demand, on Messrs. Smith, Payne, & Smith, London, for 1000*l.*, which please pass to our credit under advice. Why don't you make us a good shipment of No. 315 Italians? We are entirely out. (Signed) "W. H. Arnold & Co."

Instead, however, of the letter having gone through the post to Messrs. Williams & Co., it was abstracted by some person who had means of access to it, and the draft was stolen: but these facts did not become known to the plaintiffs until after payment of the draft had been obtained by the defendants.

It further appeared that Adolphe Hecht had left the employ of the plaintiffs on the 26th of August, without assigning any reason, and with some portion of his wages unpaid.

On the 10th of September, 1874, a Mrs. Chandler called at the defendants' bank with the draft in question. It then bore on it a forged special indorsement by Messrs. E. G. Williams & Co. to "D. H. Chandler, or order," and a blank indorsement by "D. H. Chandler." Mrs. Chandler came to the defendants without introduction. She was a middle-aged lady of respectable appearance, and said she was from America. She inquired as to the manner in which the defendants conducted their business, and asked if the defendants would receive the draft. She was answered that they would, but that it must first be realized before they could give an equivalent in cheques. She stated that she did not wish to go to the city that day, and inquired whether the defendants had any one they could send, as it was a draft payable to bearer. The defendants informed her that they had messengers going continually to the city, and would send for her, and then took the draft, and, after stamping it with the name

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of the Cheque Bank, sent it to Smith, Payne, & Co., and received the amount.

The bank on receiving the money opened an account with Mrs. Chandler, crediting, her with 1000*l.*, and Mrs. Chandler received cheque-books, by means of which she drew out the whole amount with the exception of 106*l.*

Evidence was tendered by the defendants, which was rejected, of an usual or almost invariable practice of sending, besides the letter containing the draft, a letter of advice by the same or another ship, for the purpose of shewing that the plaintiffs had by negligence afforded facilities for the fraud which had been practised; and, in the result, a verdict was directed for the plaintiffs for the amount of the draft and interest.

On the 9th of November last, an order nisi was obtained by Sir Henry James to set aside the verdict, and for a new trial, on the ground of the rejection of evidence of the plaintiffs' negligence of the ordinary usage of merchants, and in directing a verdict to be entered for the plaintiffs because the money claimed in the action was not the plaintiffs', and the defendants had been guilty of no act of conversion, and had received no money to the use of the plaintiffs; and that the plaintiffs were precluded from recovering, by neglect of proper precautions in the custody and dispatch of the draft.

Against this order cause was shewn on the 25th and 28th of February last. The questions raised were mainly these,—1, whether, under the circumstances, the money received by the defendants in payment of the draft was received to the use of the plaintiffs,—2, whether there was any evidence of negligence by which the plaintiffs were estopped from setting up against the defendants their title to the draft,—3, whether the evidence rejected was admissible for the purpose of shewing such negligence.

As regards the first question, it is clear that the property in the draft had never in fact passed out of the plaintiffs; for, indorsement consists not merely of the written indorsement on the draft, but there must also be a delivery with intention to transfer the property: *Marston* v. *Allen*. (1) In this case there was no de-

(1) 8 M. & W. 494.

livery of the draft to the indorsee, and therefore, unless the plaintiffs are estopped from setting up as against the defendants the forgery of the indorsement of Williams & Co., the bill remained their property when it reached the hands of the defendants, and they are entitled to the draft, for, the statute 16 & 17 Vict. c. 59, s. 19, only protects Messrs. Smith, Payne, & Co., the drawees (*Ogden* v. *Benas* (1)), from the consequences of paying the draft on a forged indorsement, and affords no protection to the defendants.

But it was argued that the money received by the defendants could not be regarded as money received to the use of the plaintiffs, because the defendants had been guilty of nothing like a conversion, but had acted as a mere conduit to receive and hand over the amount of the draft to their customer, Mrs. Chandler.

In the case of goods, if a man takes and sells them when he has no right, the owners may waive the tort and recover the proceeds in an action for money had and received: *Lamine* v. *Dorrell* (2); *Neate* v. *Harding* (3): and see *Hollins* v. *Fowler* (4): and equally, as was admitted by the defendants, if a person wrongfully convert a bill of exchange and receive the amount, the owner of the bill may either sue in tort or may waive the tort and recover the money as received to his use.

The question here is, whether what was done by the defendants amounted to a conversion of the bill: and we are of opinion that it did. Payment of the draft was actually obtained by the defendants from Smith, Payne, & Smith; and the next step in dealing with the money was not simply to hand it over to Mrs. Chandler, but to retain it and open an account with her, the effect of which was to appropriate it to their own use as a loan from Mrs. Chandler: see *Pott* v. *Clegg*. (5) Under these circumstances, there was nothing in the transaction at all analogous to a mere packing by a packer, or carriage by a carrier, of goods intrusted to them by a person having no title: *Greenway* v. *Fisher* (6); and see *Hardman* v. *Booth* (7): nor is the employment of banker a public employment which he is in any way bound to exercise. The defendants

(1) Law Rep. 9 C. P. 513.
(2) Ld. Raym. 1216.
(3) 6 Ex. 349.
(4) Law Rep. 7 H. L. 757; 44 L. J. (Q.B.) 169.
(5) 16 M. & W. 321.
(6) 1 C. & P. 190.
(7) 1 H. & C. 803; 32 L. J. (Ex.) 105.

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were at liberty to take the bill or not as they chose. They took it, and received the amount. The evidence also was that the defendants made use of their customers' money by lending it at interest; so that, although no interest or commission was charged on the account, they nevertheless derived benefit from the transaction.

We are of opinion, therefore, as the property in the bill remained in the plaintiffs, that the money was received by the defendants, under a mistake, it is true, but tortiously as against the plaintiffs, and that, subject to the question whether the plaintiffs have by their conduct disentitled themselves to sue, they may waive the tort and recover the proceeds as money received to their use.

On the second and third points it was contended by the defendants that there was evidence of negligence in the custody and transmission of the draft by the plaintiffs, which afforded facilities for the forgery and fraud by which the defendants were induced to receive it, and that the evidence which was rejected would have shewn an almost invariable custom for merchants in America remitting bills to correspondents in England to send another independent letter of advice either by the same or a subsequent mail, and that there were opportunities of sending such a letter by other vessels leaving on the same day as the *Celtic*, or on subsequent days, which would have arrived in time to have enabled Messrs. Williams & Co., in the event of their not having received the draft in due course, to have communicated with Smith, Payne, & Smith, either by letter or telegram, to have stopped payment.

We are of opinion, however, that there was no evidence of negligence which could operate by way of estoppel to the plaintiffs, and also that the evidence rejected was properly excluded, on the ground that it would not, if admitted, have amounted to any defence.

Reliance was placed by the defendants on the case of *Young* v. *Grote*. (1) That case, no doubt, must be considered as well decided: but various opinions have been expressed as to the real ground of the decision. In the judgment of Parke, B., in *Robarts*

(1) 4 Bing. 254.

v. *Tucker* (1), it was put on the ground that the customer had by signing a cheque given authority to any one in whose hands it was to fill it up in whatever way the blank permitted. But we have only to look at the case itself to see that it really proceeded on the authority of the extract from Pothier cited in the judgment of Best, C.J., which makes the inability to recover depend upon the fault of the drawer of the cheque in the mode of drawing it, and is entirely consistent with the rule laid down and explained on fuller consideration in subsequent cases, viz. that negligence, in order to estop, must be negligence in the transaction itself: see per Blackburn, J., in *Swan* v. *North British Australasian Co.* (2) Indeed, in a later case, *Bank of Ireland* v. *Evans's Charities* (3), this is stated by Parke, B., himself to be the true ground of decision. He says: "In that case it was held to have been the fault of the drawer of the cheque that he misled the banker on whom it was drawn by want of proper caution in the mode of drawing the cheque, which admitted of easy interpolation, and consequently that the drawer having thus caused the banker to pay the forged cheque by his own neglect in the mode of drawing the cheque itself, could not complain of that payment."

The rule which is expressed by Ashhurst, J., in *Lickbarrow* v. *Mason* (4),—"We may lay it down as a broad general principle, that, whenever one of two innocent parties must suffer by the act of a third person, he who has enabled such person to occasion the loss must sustain it,"—was, though not expressly referred to, observed and acted on in *Young* v. *Grote* (5); and it has received illustration and explanation in subsequent cases on the subject which shew that the words "enabling a person to occasion the loss" must be understood to mean, by some act, conduct, or default in the very transaction in question: see *Freeman* v. *Cooke.* (6)

The correct rule seems to us to be that which is thus stated by Blackburn, J., in his judgment in *Swan* v. *North British Australasian Co.* (2), where, referring to the judgment of Wilde, B., below,

(1) 16 Q. B. 560.
(2) 2 H. & C. 181; 32 L. J. (Ex.) 277.
(3) 5 H. L. C. 389.
(4) 2 T. R. 70.
(5) 4 Bing. 254.
(6) 2 Ex. 654; 18 L. J. (Ex.) 117.

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he says, "that he omits to qualify the rule (he had stated) by saying that the neglect must be in the transaction itself and be the proximate cause of leading the party into that mistake; and also must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public, of whom that person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons with whom those seeking to set up the estoppel are not privy." *Young* v. *Grote* (1), when correctly understood, is in entire accordance with the rule thus expressed. So is *Ingham* v. *Primrose* (2), also cited to us, in which the negligence was in the destruction of a draft afterwards put together and fraudulently presented; while, in the case of *Bank of Ireland* v. *Evans's Charities* (3), it was expressly held both that the negligence in order to operate as an estoppel must be negligence "in or immediately connected with the transfer itself," and further that it must also be "the proximate cause of the loss." We may also refer to the judgment of Williams, J., in *Ex parte Swan* (4), as shewing the distinction between *Young* v. *Grote* (1) and those cases in which the neglect, if any, was collateral to the transaction.

Let us inquire, then, how far there was in this case any actual proof of such neglect, or of any breach of duty to the defendants as members of the general public.

No authority whatever was cited to us for the contention that negligence in the custody of the draft will disentitle the owner of it to recover it or its proceeds from a person who has wrongfully obtained possession of it. Here, there was nothing in the draft or the indorsement with which the plaintiff had anything to do, calculated in any way to mislead the defendants. It was regularly indorsed, and was then inclosed in a letter to the plaintiffs' correspondents, to be sent through the post. There could be no negligence in relying on the honesty of their servants in the discharge of their ordinary duty, that of conveying letters to the post; nor can there be any duty to the general public to

(1) 4 Bing. 253.
(2) 7 C. B. (N.S.) 82; 28 L. J. (C.P.) 294.
(3) 5 H. L. C. 389.
(4) 7 C. B. (N.S.) 400; 30 L. J. (C.P.) 113.

exercise the same care in transmission of the draft as if any or every servant employed were a notorious thief. It may be said here, as in the case of *Bank of Ireland* v. *Evans's Charities* (1), merely substituting for the "custody of the seal," "the posting of the letter," and for "the act of transfer," "the receipt of the draft by the defendants," "If there was negligence in the custody of the seal, it was very remotely connected with the act of transfer. The transfer was not the necessary, or ordinary, or likely result of that negligence. It never could have been but for the occurrence of a very extraordinary event, that persons should be found either so dishonest or so careless as to testify on the face of the instrument that they had seen the seal duly affixed." And in that case it is asked, "If such negligence could disentitle the plaintiffs, to what extent is it to go? If a man should lose his cheque-book, or neglect to lock the desk in which it is kept, and a servant or a stranger should take it up, it is impossible to contend that a banker paying his forged cheque would be entitled to charge his customers with that payment."

The cases thus put are quite as strong or stronger cases than the present, both as to negligence and as to its connection with the subsequent fraud; for here the fraud could not have been committed without a larceny of the letter and a forgery of the indorsement. We are of opinion, therefore, that there was no neglect proved sufficient to disentitle the plaintiff from relying on the forgery of the indorsement.

It remains to be considered whether the evidence tendered was properly rejected. All that it proposed to prove was, that it was an almost invariable custom on the part of merchants remitting from America, to send a duplicate letter of advice either by the same or another subsequent vessel,—a step which though prudent as regards the sender, and which might or might not have led to communications which would have stopped payment of the bill and prevented the proceeds being received by the defendants, was entirely collateral to the transmission of the draft, and which it certainly was no part of the duty of the plaintiffs either to Messrs. Williams & Co. or to the general public to have sent. If it were the duty of the plaintiffs to guard against larceny and

(1) 5 H. L. C. 389.

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forgery in that way, it is impossible to say where, as observed by Parke, B., in *Bank of Ireland* v. *Evans's Charities* (1), on that principle, it is to stop. The post-office is a recognised means of transmitting letters with their contents (not being actual money), in the regularity of which full confidence may be placed. But, if there be such a duty in this case the breach of which would amount to a neglect of proper precaution, and disentitle the plaintiff to sue, it would equally be negligent on the part of every sender of a cheque for a large amount not to send a separate letter of advice with it, which would entail upon the senders of cheques new and unheard of responsibilities. Besides, this duty would be collateral to the indorsing and forwarding of the draft, and the omission of it could in no sense be considered as the proximate cause of the larceny and forgery which have occurred; and no authority has been cited to us to the effect that any such failure of a precaution merely collateral could in any way affect the title of a plaintiff to sue.

We are of opinion, therefore, that the evidence tendered was rightly rejected; and for these reasons we think that the order should be discharged, and with costs.

Order discharged.

Solicitors for plaintiffs: *Field, Roscoe, Osbaldeston, & Co., for Taylor & Co., Bradford.*

Solicitors for Cheque Bank: *Nash, Field, & Mathews.*

Solicitors for City Bank: *Linklater, Hackwood, Addison, & Brown.*

(1) 5 H. L. C. 389.

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May 3.

Master and Servant—Contract of Hiring—Wrongful Dismissal.

The plaintiff, a master mariner, accepted the command of the defendant's ship under a written agreement, as follows:—"I hereby accept the command of the ship *City Camp* on the following terms: Salary to be at and after the rate of 180*l.* sterling per annum." "Should owners require captain to leave the ship abroad, his wages to cease on the day he is required to give up the command, and the owners have the option of paying or not paying his expenses travelling home." "Wages to begin when captain joins the ship:"—

Held, that the plaintiff could not (except under unusual circumstances) be dismissed without a reasonable notice.

1 C P D 356

ACTION for alleged wrongful dismissal of the plaintiff. At the trial before Lush, J., at the Liverpool Assizes, 1875, it appeared that the plaintiff was, by a contract in writing dated the 28th of March, 1875, engaged by the defendant as master of the ship *City Camp*. The contract contained the following (amongst other) provisions:—"Salary to be at the rate of 180*l.* per annum." "Should owners require captain to leave the ship abroad, his wages to cease on the day he is required to give up the command, and the owners have the option of paying or not paying his expenses travelling home." "Wages to begin when captain joins the ship."

The plaintiff, in pursuance of this agreement, took the command of the ship. Arrived at Liverpool, the homeward cargo was discharged and a portion of a return cargo loaded, when, on the 10th of August, 1875, the defendant, without notice, and without any justifiable cause, discharged the plaintiff, insisting that by the terms of the contract he was not entitled to any notice.

The learned judge ruled that, the contract being specific, in the absence of any evidence of custom, as in the case of clerks and servants, the plaintiff was not entitled to any notice.

Jan. 12. *Herschell, Q.C.*, in the last Hilary sittings, obtained an order nisi for a new trial, on the ground of misdirection.

May 3. *T. H. James* shewed cause. By the express terms of the contract the owner had a right to dismiss the captain *abroad* at any time. The hiring was for an indefinite time, and was determinable at any time, at all events before the commencement of

Cf Ashcroft, 1 C P D 354.

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a voyage. In Smith's Master and Servant, 3rd ed. p. 76, it is said: "In cases to which the custom applicable to domestic servants does not apply, and in which no specific agreement has been made as to the notice to be given for the purpose of determining the contract, the question must be determined by the custom applicable to the particular trade or calling with reference to which the service is to be rendered." Here there is no custom. In *Hiscox* v. *Batchelor* (1), where a written agreement to employ a person as an advertising agent contained no provision as to the notice which should determine the agreement, Byles, J., said that the notice must be a reasonable one; and, a month's notice having been given, the jury found for the defendant. So, in *Foxall* v. *International Land Credit Co.* (2), it was left by the same learned judge to the jury to say what was a reasonable notice in the case of a clerk. In the present case, the hiring was not an ordinary hiring for a year. The defendant had clearly a right to dismiss the plaintiff before the commencement of the new voyage.

[LORD COLERIDGE, C.J. The hiring being indefinite, it is a hiring for a year, in the absence of anything to shew the contrary: *Rex* v. *Inhabitants of Hampreston.* (3)]

The case of a master of a ship is an exceptional one.

[LORD COLERIDGE, C.J. Why so?]

It would be extremely inconvenient if the service were to determine in the middle of a voyage; therefore it cannot be intended to be a service for a year. The parties here have expressly stipulated to exclude notice; by the very terms of the contract the wages are to cease from the day the captain is required to give up the command of the ship.

Herschell, Q.C., in support of the order. The ruling of the learned judge cannot be supported. Primâ facie, no doubt, an indefinite hiring is a hiring for a year determinable by notice if there be a custom, or, in the absence of custom, by a reasonable notice. If it be determinable without notice by the employer, it must be equally so by the employé. That in a case like this would be so unreasonable that it cannot be presumed to have been

(1) 15 L. T. 543. (2) 16 L. T. (N.S.) 637.
(3) 5 T. R. 205.

the intention of the parties. It may be that by custom the engagement might have been determinable at the end of the voyage, viz. at Belize. But there was evidence of the continuance of the hiring beyond that period: and that would be for the jury. In *Fairman* v. *Oakford* (1), Pollock, C.B., says: "There is no inflexible rule that a general hiring is a hiring for a year; each particular case must depend on its own circumstances. From much experience of juries, I have come to the conclusion that usually the indefinite hiring of a clerk is not a hiring for a year (absolutely), but rather one determinable by three months' notice." Here the stipulation for a dismissal without notice is expressly confined to a dismissal abroad.

LORD COLERIDGE, C.J. We entertain a strong opinion in this case: but, as the matter is one of great general importance, and one upon which there is no distinct authority, we will take time to consider.

Cur. adv. vult.

May 10. The judgment of the Court (Lord Coleridge, C.J., and Archibald and Lindley, JJ.,) was delivered by

LORD COLERIDGE, C.J. This was an action tried before my Brother Lush at Liverpool in December, 1875, in which he directed a verdict to be entered for the defendant; and we have to determine whether that direction was correct.

The plaintiff had been the master of the ship *City Camp*, under a written contract dated the 28th of March, 1875, from that day until the 10th of August, 1875, when he was dismissed, not for misconduct, but without notice, the defendant contending that, by the terms of the contract between the plaintiff and himself, the plaintiff was not entitled to any notice before dismissal. Other points arose in the case, but were not discussed before us.

The action was brought for a dismissal wrongful in being without notice; and the sole question argued was, whether, under the contract, the plaintiff was entitled to notice before dismissal, and on this single point my Brother Lush directed the verdict for the defendant.

(1) 5 H. & N. 635, 636; 29 L. J. (Ex.) 459.

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The contract, so far as it is material to set it out, was as follows:—

"I hereby accept the command of the ship *City Camp* on the following terms: Salary to be at and after the rate of 180*l.* sterling per annum." Then followed certain other terms not material, and then,—"Should owners require captain to leave the ship abroad, his wages to cease on the day he is required to give up the command, and the owners have the option of paying or not paying his expenses travelling home. . . . Wages to begin when captain joins the ship."

"Francis Creen, Master, *City Camp*."

It was contended for the plaintiff that, under this contract, he was entitled to a reasonable notice before dismissal, at any rate if dismissed in this country; and my Brother Lush held that he was not: but, upon consideration, we are of opinion that he was.

The relation of the master of a ship to his employer, the ship-owner, is not one in which, in the case of an indefinite hiring, the law has made, and there was no evidence of any custom making, the hiring a hiring for a year or for any other definite time, nor the notice by which the service is to be determined certain. As to the hiring, we adopt the language of Pollock, C.B., in delivering the judgment of the Court in *Fairman* v. *Oakford* (1): "There is no inflexible rule that an indefinite hiring is a hiring for a year. Each particular case must depend upon its own circumstances." As to the notice, we think the sound construction of the contract before us is, that, except in the single case provided for by its terms, there must be a reasonable notice before it can be put an end to by either party. The rule of construction must be the same for both parties to the contract. If the ship-owner may dismiss the master without notice on the very eve of a voyage, the master may leave the ship without notice at the same point of time. But the great inconvenience and heavy loss which might be, and indeed in most cases would be, inflicted on the ship-owner, without any remedy, by such a construction of the contract if acted on by the master, lead us to believe that such is not and could not be the meaning of the contract nor the intention of the parties to it. The loss and

(1) 5 H. & N. 635; 29 L. J. (Ex.) 459.

inconvenience to the master following upon the construction contended for, though not positively so great, may be relatively very great indeed: and this consideration points to the same conclusion. The provision that the master's wages shall cease instantly upon dismissal abroad, may well have been intended to prevent any question as to the ship-owner being liable to the whole expense of bringing the master back to the United Kingdom; and does not appear to us to permit an argument for construing the contract so as to enable either party to put an end to it at any time without notice of any kind. Indeed, upon the construction of the contract contended for by the plaintiff, and if no notice before putting an end to it was required at any time on the part of either master or ship-owner, it is not easy to assign a reason for the insertion of this particular provision into the contract. Nor was any satisfactory reason offered to us why the rule "Expressio unius est exclusio alterius" should not apply to it.

We think, therefore, that, under his contract, as the master could not, except under very unusual circumstances, be dismissed during the continuance of a voyage and while the vessel was at sea, so he was entitled to some notice, and that is to reasonable notice, before dismissal in this country.

There is some authority for saying that, as a proposition of general law, reasonable notice is to be implied as a term of such a contract of hiring as this. Sir John Byles so laid down the law at nisi prius in the case of *Hiscox* v. *Batchelor* (1); and the case of *Fairman* v. *Oakford* (2), already referred to, seems, if the facts of it be carefully considered, to be an authority to the same effect. For, in the absence of stipulation for any notice, a month's notice was held reasonable to determine an indefinite hiring of a clerk, on the ground that the same clerk had accepted such a notice as sufficient to determine a former indefinite hiring also without stipulation for notice of any kind. It is nowhere suggested that the absence of stipulation made no notice necessary in either of the hirings, which would have been a short and simple ground, if a sound one, for upholding the verdict in that case.

But, without intending to throw any doubt whatever upon these cases, we decide the one before us upon its own circum-

(1) 15 L. T. 543. (2) 5 H. & N. 635; 29 L. J. (Ex.) 459.

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stances, and upon considerations especially applicable to the contract on which the dispute arose. And we think that the order must be absolute for a new trial.

Order absolute.

Solicitors for plaintiff: *Evans & Lockett, Liverpool.*

Solicitors for defendant: *Gregory, Rowcliffes, & Co., for Hull, Stone, & Fletcher, Liverpool.*

May 5.

MATHER, APPELLANT; BROWN, RESPONDENT.

Municipal Corporations Act (6 & 7 *Wm.* 4, *c.* 76), *s.* 142—*Municipal Elections Act*, 1875 (38 & 39 *Vict. c.* 40), *s.* 1, *subss.* 1, 2, 3, *and s.* 13—*Misnomer of Candidate in Nomination-paper.*

1 CPD. 674
5 CPD. 256
258, 262-5,

In a nomination-paper at an election for town-councillors of a borough under the Municipal Elections Act, 1875, the name of a candidate, which was Robert Vicars Mather, was inserted thus,—"Robert V. Mather:"—

Held, not such a statement of "the surname and other names of the persons nominated" as to satisfy the requirements of s. 1 of the Act and the form given in the 2nd schedule; and that the inaccuracy was not cured by s. 142 of 6 & 7 Wm. 4, c. 76.

THIS was a petition presented by Robert Vicars Mather to set aside the decision given on the 23rd of October, 1875, by Walter Smith, one of the respondents, the mayor of the town of Southport, in his capacity of returning officer of that town, whereby the said Walter Smith allowed an objection to the nomination-paper of the petitioner, in consequence of which the petitioner was excluded from the election of town-councillors held in the town of Southport for the Talbot Ward, on the 1st of November, 1875, and the two other respondents Brown and Witham, were declared duly elected and returned. The facts were stated in a special case for the opinion of the Court, as follows:—

1. The borough of Southport, in the county of Lancaster, is divided into wards, one of which wards is called the Talbot Ward. The Talbot Ward is represented in the council of the borough by six councillors, two of whom retire annually, and two are elected to fill the vacancies on the 1st of November in each year, and remain in office for the space of three years.

2. On the 22nd of October, 1875, the petitioner was nominated

as a candidate at the forthcoming election of two town-councillors for the Talbot Ward in the town of Southport, to be holden on the 1st of November, 1875, he being duly qualified in that behalf.

3. The petitioner was on the burgess-roll for the time being then in force for the Craven Ward of the borough, and on such burgess-roll was described as Mather, Robert V., House, Chapel Street; and there was no other person of the surname of Mather residing in Chapel Street, on the said burgess-roll.

4. There were only three persons of the surname of Mather other than the petitioner on the burgess-roll for the time being then in force for the borough, two of whom were females, and the other described as Mather, Richard, House, 28, Sussex Road, and he is not an hotel proprietor.

5. The above-named Charles Henry Brown and Joseph Witham and one Jean Paul Denssen were also nominated as candidates at the said election for the said ward.

6. The nomination-paper of the petitioner was as follows:—

Surname.	Christian Names.	Abode.	Description.
Mather.	Robert V.	Chapel Street.	Hotel Proprietor.

The same was duly signed by a proposer, a seconder, and eight assenting burgesses duly qualified in that behalf, and was duly handed before five o'clock to the town-clerk by the seconder of the petitioner seven days at least before the day of the election, pursuant to s. 1, subs. 2, of the Municipal Elections Act, 1875, 38 & 39 Vict. c. 40.

The town-clerk of the borough sent notice of such nomination to the petitioner pursuant to s. 1, subs. 3, of the Municipal Elections Act, 1875, 38 & 39 Vict. c. 40.

The petitioner then resided at Chapel Street, and had done so for some years, and was and is an hotel proprietor.

7. On the 23rd of October, 1875, the above-named Walter Smith, being the mayor and returning-officer of the borough, attended between the hours of 2 and 4 in the afternoon at the town-hall of the borough to decide on the validity of objections which might be made to the nomination-papers of the candidates.

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8. At about 10 minutes to 4 o'clock on the day last aforesaid, an objection in writing was made by an agent of Joseph Witham, and with his assent, to the validity of the nomination-paper of the petitioner. The objection was in the words and figures following,— "I, John Holt, the agent appointed by and on behalf of Joseph Witham, a candidate for the Talbot Ward, in the borough of Southport, do hereby object to the nomination-paper of Robert V. Mather as a candidate for the said ward, on the ground that his surname and other names are not stated in the said nomination-paper in accordance with subs. 2 of s. 1 of the Municipal Elections Act, 1875. Dated this 23rd day of October, 1875. John Holt." Neither the petitioner nor any one on his behalf was present when the said objection was made and decided on.

9. The said mayor gave his decision in writing, allowing the said objection, which was as follows,—

"I, mayor of the borough of Southport, do hereby allow the objection to the nomination-paper of Robert V. Mather, made by Mr. John Holt.

"Walter Smith, Mayor, 23rd Oct., 1875."

10. By reason of such decision as aforesaid, the town-clerk of the borough of Southport published the names of the said Charles Henry Brown, Joseph Witham, and Jean Paul Denssen as being the only candidates duly nominated for election to the office of councillors at the said election to be holden for the said ward.

11. The election was held on the 1st of November, 1875, and Charles Henry Brown, Joseph Witham, and Jean Paul Denssen went to the poll; but the petitioner did not do so, and was prevented from so doing solely by reason of the decision aforesaid of the said mayor against the validity of his nomination.

12. The said Charles Henry Brown and Joseph Witham were declared by the said mayor to be duly elected at the said election of town-councillors for the Talbot Ward aforesaid, and he returned them as having been so elected.

13. The petitioner thereupon in due course petitioned against the said return; and by order of Huddleston, B., dated the 14th of December, 1875, the present case has been stated for the opinion of the Court.

14. If the nomination of the petitioner was a valid nomination,

and not invalid as decided by the mayor, then the election and return of Charles Henry Brown and Joseph Witham was not a valid and legal election and return.

15. The nomination paper of Joseph Witham, which was handed in to the town-clerk on the same day as that of the petitioner, was not signed by a proposer and seconder and by eight other inrolled burgesses of the said borough or ward as assenting to his nomination, pursuant to s. 1, subs. 2, of the Municipal Elections Act, 1875 (38 & 39 Vict. c. 40), inasmuch as one of the eight persons signing the said nomination-paper was not on the burgess-roll for the time being of the said borough or ward.

16. No objection was taken to this before the mayor.

17. The burgess-roll used by the proposer, seconder, and the eight assenters to the nomination-paper of the petitioner and of the said Jean Paul Denssen was used by the proposer, seconder, and assenters to the nomination-paper of the said Joseph Witham.

The question for the opinion of the Court was, whether the said Charles Henry Brown and Joseph Witham, or either of them, were or was duly elected and returned.

May 4. *A. L. Smith* (*Hutton* with him), for the petitioner. The decision in *Reg.* v. *Plenty* (1) is conclusive of the present case. There, the candidate was inserted in the voting paper as W. Penford, his name being William Penford, and it was held that the initial W., instead of the name William, was a misnomer cured by the Municipal Corporation Act 5 & 6 Wm. 4, c. 76, s. 142, which enacts that no misnomer or inaccurate description of any person in a voting-paper required by that Act shall hinder its full operation, provided the description of such person be such as to be commonly understood. The Municipal Corporations Act is incorporated by the Ballot Act, 1872, 35 & 36 Vict. c. 33, s. 22, subs. 2, and the Corrupt Practices Municipal Elections Act, 1872, 35 & 36 Vict. c. 60, s. 2: consequently, this is a misnomer or inaccurate description which is cured by s. 142 of the former Act. It is clear that the description was such as to be commonly understood. There is no cause why the same reasoning should not apply to a nomination-paper as to a voting-paper: see *Reg.* v.

(1) Law Rep. 4 Q. B. 346.

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Tugwell (1), per Hannen, J. It is true that the nomination-paper is rendered necessary by the Ballot Act, 1872, and consequently the 142nd section of the Municipal Corporations Act could not as it stood in that Act apply to nomination-papers: but the effect of the incorporation is that the language of the incorporated provisions must be read as applying to the provisions of the incorporating Act; consequently, the provisions as to misnomer and inaccurate description apply to nomination-papers under the Ballot Act. The legislature could not have meant that a nomination-paper such as this should be void.

The respondent did not appear.

Cur. adv. vult.

May 5. LORD COLERIDGE, C.J. In this case, which was argued yesterday before my Brothers Archibald and Lindley and myself, we took time to consider in order to see if, consistently with the authorities, we could overcome the objection taken to the nomination-paper of the petitioner, and I now proceed to state the conclusion at which I have arrived,—a conclusion in which my Brother Archibald authorizes me to say he concurs.

I yield to this objection with the greatest possible reluctance; but, looking at the language of the Act, I am unable to come to any other result than that the objection is a good one, and must prevail.

The question arises thus:—At the last election of town-councillors for Southport, the petitioner was nominated as a candidate, and the nomination-paper was in all respects in proper form, and duly delivered, except that it was not signed with the full Christian name of the candidate, ~~who had~~ signed it "Robert V. Mather," his second Christian name being "Vicars:" and the question is whether that is a fatal objection. The objection was taken in proper time, and was ~~overruled~~ by the mayor. I feel obliged to hold that the objection was a good one and ought to have been allowed.

The Municipal Elections Amendment Act which passed last year (38 & 39 Vict. c. 40) directs, amongst other things, that the nomination-paper shall state the surname and other names of the persons nominated, according to the form given in the second schedule. There is ample opportunity afforded for correct-

(1) Law Rep. 3 Q. B. 704, 713.

ing any misnomer or inaccurate description; for, the nomination-paper may be delivered to the town-clerk by the candidate himself: s. 1, subs. 3.

Now, to begin with,—is this a misnomer? In the absence of all authority, I do not know that I should so hold; but I find two authorities in the Queen's Bench, one in the time of Lord Campbell, which shew that it is a misnomer, viz. *Reg.* v. *Bradley* (1) and *Reg.* v. *Plenty* (2), which shew that an abbreviation of Wm. or Wlm. for William would be a misnomer within s. 142 of 6 & 7 Wm. 4, c. 76, which enacts that "no misnomer or inaccurate description of any person, body corporate, or place named in any schedule to this Act annexed, or in any roll, list, notice, or voting paper required by this Act, shall hinder the full operation of this Act with respect to such person, body corporate, or place, provided that the description of such person, body corporate, or place be such as to be commonly understood."

We must assume, then, that Robert V. Mather in this nomination-paper is a misnomer. Is it one which is cured by s. 142 of the Municipal Corporations Act? The 13th section of the Municipal Elections Act, 1875, incorporates the former Act, but unfortunately it does so in these words,—"This Act shall, as far as consistent with the tenor thereof, be construed as one with the Act 5 & 6 Wm. 4, c. 76, and the Acts amending the same," &c. It does not say that the provision in s. 142 of the former Act shall be extended to the later Act, but merely that it shall be construed as one with it. These terms do not seem to me to extend the operation of the amending section in the earlier Act to a document which had no existence then, and therefore could not have been in the contemplation of the legislature.

I repeat that I yield to the objection with great reluctance; nevertheless, it is one which the party had a right to take; it was taken in time, and was properly allowed by the mayor.

It must be remembered that, in dealing with cases under these Acts, we are sitting as a final tribunal of appeal, in the exercise of a duty cast upon us under peculiar circumstances and as a sort of compromise between conflicting parties in the legislature, and

(1) 9 B. & S. 386; 38 L. J. (Q.B.) 205; Law Rep. 4 Q. B. 346.

(2) 3 E. & E. 634; 30 L. J. (Q.B.) 180.

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therefore are more especially bound to keep ourselves strictly within the letter of the Acts, and to abstain from any attempt to strain the law. Therefore, although I yield reluctantly to the objection, conceiving it to be a fair one, I do so without hesitation. There must be judgment for the respondent.

LINDLEY, J. I am of the same opinion. I have examined the authorities to see if they would supply any reasoning by which we might get over this objection. But I have found nothing to support the petitioner's view. On the contrary, I have found two cases which look the other way, shewing that a mere incorporation by reference of a former Act does not extend all the provisions of the earlier to the later Act. These are *Lane* v. *Bennett* (1) and *Davison* v. *Farmer*. (2) Having regard to the principles upon which these Acts are framed, it is not for us to cure what we may conceive to be defects in them.

Judgment for the respondent.

Agents for petitioner: *Gregory, Rowcliffes, & Co., for Farr & Sadler, Southport.*

May 25.

BURCHELL *v.* CLARK AND ANOTHER.

Lease—Discrepancy, as to Duration of Term, between Habendum and Reddendum, and between Lease and Counterpart—Reformation of Deed.

Where there is an irreconcileable discrepancy between a lease and its counterpart, the former must be taken to be correct rather than the latter.

Where the statement of the duration of the term in the habendum differs from that in the reddendum, the statement of the term in the latter will be treated as surplusage, and the former must prevail.

In 1784, a lease was granted, habendum for 94¼ years, reddendum for 91¼ years. The counterpart in both places had it 91¼ years; and there were circumstances (not strictly evidence) which tended to shew that the term really intended to be granted was 91¼ years only. In ejectment by the assignee of the reversion against the assignee of the lessee, brought in 1876:—

Held, that, the lease being the superior part of the instrument (treating the lease and counterpart as one deed), the statement in the habendum thereof must prevail; and that, as between the parties to the action, there could be no reformation.

Cited on 4 Ch D 602 C.A.

SPECIAL CASE. 1. The plaintiff sues as owner in fee of the premises contained in a lease dated the 3rd of September, 1784.

(1) 1 M. & W. 70. (2) 6 Ex. 242; 20 L. J. (Ex.) 177.

2. By that lease the premises mentioned in the statement of claim were demised to Samuel Coney, his executors, administrators, and assigns, "To have and to hold the said premises from the feast of St. John the Baptist last past before the date hereof for and during and unto the full end and term of *ninety-four years and one quarter of a year* from thence next ensuing: Yielding and paying therefor yearly and every year during the said term of *ninety-one years and one quarter of a year* hereby demised unto the said Henry Penton the yearly rent of three pounds."

3. The lease was executed by Henry Penton only.

4. Indorsed upon the lease was a description of its contents, as follows:—

Dated 3rd Sept. 1784.

Henry Penton, Esq.,	Lease of a house and premises in the New Road leading from Paddington to Islington.
to	Commencing 24th June, 1784.
	For 94¼ years.
Mr. Samuel Coney.	Rent, 3*l.* per annum, payable quarterly.

5. The 4 in 94 had originally been 1, and the + had been added at some time of which there was no evidence.

6. It was objected that this fact could not be taken into consideration; such objection to be dealt with by the Court.

7. The counterpart of the lease, signed by Coney, the lessee, corresponded in all respects with the lease, except that in the habendum the term stated is ninety-one years and one quarter instead of ninety-four years and one quarter, and the same on the indorsement, if that can be regarded.

8. The house in question is one of a row of seven houses, all of which belonged to the same lessor, and the remaining six of which were demised by indentures of lease dated the 31st of July, 1784; five of the said remaining six houses being demised for the term of 91¼ years from the said feast of St. John the Baptist, and the sixth one from the 29th of September of that year for the term of 91 years, to the same lessee or to others by his direction.

9. This evidence also is objected to, and to be dealt with by the Court.

10. The plaintiff claims as owner in fee on the expiration of the lease.

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11. The defendant is executor of one Ann Hill, who had purchased the residue of the term.

12. He defends as landlord, an underlease not yet expired having been granted by her.

The question for the Court is, whether the lease of 1784 was one for 94¼ or 91¼ years. If the former, judgment for defendants: if the latter, for plaintiff, as prayed for in statement of claim.

Finlay, for the plaintiff. It is quite obvious that this was intended to be a lease for ninety-one years and a quarter only; and the description in the habendum must be treated as a mistake. In the reddendum the term is stated to be 91¼ years, and the counterpart everywhere describes it as 91¼ years; the 94 therefore is inconsistent with the reddendum and also inconsistent with the counterpart; and the house in question is one of a row, the leases of which were granted at the same time, and all are for 91¼ years only.

[BRETT, J. Can the Court look at the counterpart for the purpose of correcting a supposed blunder in the lease?]

The counterpart is always admitted as evidence of the demise: *Houghton* v. *Kœnig*. (1) The consequence of holding this to be a lease for 94¼ years will be that the tenant will occupy for three years without paying any rent. In Leake on Contracts, p. 173, it is said: "Where a mistake in a written contract is so obvious on the face of it as to leave no doubt of the intention of the parties without the assistance of external evidence, the contract is construed according to the obvious intention of the parties. Accordingly, where it was manifest on the face of an instrument that one name had been written by mistake for another, the Court read the instrument with the mistake corrected. So, where in a bond the condition was written that it should be void if the obligor did not pay a sum of money, the Court recognised the 'not' as inserted by mistake, and read the bond without it: *Wilson* v. *Wilson* (2), and an *Anonymous Case* referred to in the judgment of Lord St. Leonards." (3) In *Spyve* v. *Topham* (4), a lease for a year was made between A. and B.; the release stating B. to be a trustee for

(1) 18 C. B. 235.
(2) 23 L. J. (Ch.) 697.
(3) 23 L. J. (Ch.) at p. 703.
(4) 3 East, 115.

C., granted the premises unto C. in his possession being by virtue of an indenture of lease bearing date the day before the release, and to his heirs, habendum to B. and his heirs to such uses as C. should appoint; and it was held that the release was sufficient to convey the premises to B., and that the words in the granting part, "unto C., &c.," might be rejected as surplusage. And see *Strickland* v. *Maxwell* (1); *Morton* v. *Woods.* (2)

Graham (*Benjamin, Q.C.*, with him), contrà. The fact of other leases having been granted at the same time amounts to nothing. The habendum is the proper place to look for the duration of the term. "The habendum of a deed is that part of a deed which doth begin with to have and to hold. And this clause doth properly succeed the premises. And the office hereof is to set down again the name of the grantee, the estate that is to be made and limited, or the time that the grantee shall have in the thing granted or demised, and to what use." Shep. Touch. 75.

[BRETT, J. Reading the lease and counterpart together, it is obvious that the term was intended to be for 91¼ years, and not 94¼ years.]

"If there be any difference between the parts, the counterpart shall be made to agree with the principal, and it [the error] shall be deemed the misprision of the clerk:" Shep. Touch. 53. The lease is the effectual part of the transaction; and is to be construed most strongly against the grantor. In modern leases it is not usual to repeat the duration of the term in the reddendum. (3)

[BRETT, J. Are there any cases of applications to Courts of equity to reform leases under circumstances such as these?]

The cases of reformation of deeds have always been as between the original parties to them. Here, the defendant represents a sublessee who has underlet upon the faith of the term being for 94¼ years. The principle upon which equity will grant relief by way of reformation is well stated by the Master of the Rolls in *Garrard* v. *Frankel.* (4) The rule of construction has always been that, "if there be two clauses or parts of the deed repugnant the one to the other, the first part shall be received and the latter rejected,

(1) 2 C. & M. 539.
(2) Law Rep. 4 Q. B. 293.
(3) See the precedents in Bythewood's Conveyancing, 3rd ed., by Sweet, pp. 519 et seq.
(4) 30 Beav. 445.

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except there be some special reason to the contrary:" Shep. Touch. 88.

[BRETT, J. Is not the more modern rule this, that all the parts of the deed are to be read together, so as if possible to give a sensible construction to the whole instrument? See Shep. Touch. 87.]

As to the alteration of the indorsement, the presumption would be that it was made at the time of the grant: *Doe* d. *Tatum* v. *Catomore*. (1)

[BRETT, J. If the deed cannot be reformed, the indorsement is of no value.]

Finlay, in reply. *Garrard* v. *Frankel* (2) is clearly distinguishable. The plaintiff here stands in a better position than the defendant; the latter bought under the instrument containing the discrepancy, and took her chance, and made no inquiry; whereas the plaintiff is an assignee of the original lessor, and took without notice that there was anything in the transaction to suggest the necessity for inquiry. If the contention on the part of the defendant is correct, the covenants to insure, &c., will have no operation during the last three years of the term. Less violence will be done to the whole instrument if the plaintiff's construction is adopted than if that of the defendant is allowed to prevail.

BRETT, J. I cannot say that this is otherwise than a case of difficulty; but, upon the whole, I think our judgment must be for the defendant. The plaintiff, being assignee of the original lessor, brings ejectment alleging that the term created by the lease has expired by effluxion of time: the defendant is the executor of an assignee from the original lessee. In the lease the term mentioned in the habendum is 94¼ years from the 24th of June, 1784; but the reddendum is as follows,—"Yielding and paying therefor yearly and every year during the said term *of ninety-one years and one quarter of a year* hereby demised, unto [the lessor] the yearly rent of 3*l*." In the counterpart, the term stated both in the habendum and in the reddendum is 91¼ years.

There are other circumstances mentioned in the case. The indorsement on the counterpart indicates a term of 91¼ years; and

(1) 16 Q. B. 745. (2) 30 Beav. 445.

that on the original lease had originally been 91¼ years, but the 1 had at some uncertain time been changed into a 4. The house in question was one of a row of seven belonging to the same lessor and all demised about the same day, and the other six were all granted for 91¼ years only. The evidence as to these facts was of course objected to; but it was argued for the plaintiff that they shewed that the manifest intention of the original parties to the lease in question was to create a term of 91¼ years, and that therefore the Court should reform (or treat as reformed) the lease, and so make the whole consistent, viz. a lease for 91¼ years. On the other hand, it was urged that a deed can only be reformed where the intention is manifest, and where the question arises between the original parties; and that here, the lease being in the hands of an assignee of the lessee, the Court could neither reform it nor treat it as reformed. To this it was answered that the plaintiff is assignee of the lessor, and therefore had a right to assume from the counterpart in his possession that the term therein represented was the correct term; whereas, the defendant represents a purchaser from the lessee, who purchased according to the description in the lease, and consequently had more notice of the difficulty of the title than the plaintiff could have, and was bound to inquire. I think that argument cannot prevail. It is the plaintiff who is asking for the interference of the Court,—for a reformation of the deed. Assuming, but not determining, that the Court can look at all the facts set out in the case, and that those facts should induce us to reform this lease, I think, looking at the position of this plaintiff and this defendant, we ought not to reform it. The defendant has bought the premises from the lessee upon the faith of the lease. I cannot think it right to say that the purchaser of a lease, if the construction upon the face of it is doubtful, is under any obligation to look from the superior to the inferior document to see whether or not the two are consistent. He has a right to assume that the counterpart is in all respects in conformity with the lease. I think the plaintiff is not entitled to this remedy as against the defendant, who was not a party to the original lease. We must, therefore, treat the lease as unreformed.

Now, the authorities shew that the lease and counterpart form one document, the lease being the superior; and that, if there is

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any discrepancy between them, the counterpart is to be considered wrong by the misprision of the clerk, and the lease is to prevail; and, further, that the habendum is to prevail over the reddendum. The proper way, therefore, will be to regard as surplusage the words of the reddendum, "the said term of 91¼ years," leaving it to read "yielding and paying therefor yearly and every year during the said term hereby demised, unto [the lessor] the yearly rent of 3*l*." The ejectment therefore fails, and the defendant is entitled to judgment.

ARCHIBALD, J. I am of the same opinion. The question here arises upon a lease the habendum of which states the term to be 94¼ years from the 24th of June, 1784, and the reddendum, unnecessarily repeating the term, stated it to be 91¼ years; in the counterpart the term is in both places stated to be 91¼ years; and the question is to which we are to give effect. On the part of the plaintiff, it is contended that he is entitled to have the lease reformed by the counterpart. But I think Mr. Graham has satisfactorily shewn us that, the lease having been assigned to the defendant's testatrix, who had no means of knowing that there was any discrepancy between the instrument under which she bought and that under which the plaintiff bought, the Court of Equity would not reform the lease. Taking it therefore as unreformed, how are we to treat it? We were referred to Sheppard's Touchstone, p. 75, where the office of the habendum is, "to set down again the name of the grantee, the estate that is to be made and limited, or the time that the grantee shall have the thing granted or demised, and to what use." At p. 52 also the learned author, dealing with "the parts of a deed," says: "The office of the habendum is, to name again the feoffee, lessee, &c., and to set forth what estate he shall have, and for what time he shall hold the thing given or granted." That of the reddendum is, "to set forth by what rent he shall hold the land." Then at p. 53 we find this: "Although both parts of the indenture are but as one deed, yet the part of the grantor is as the principal, and the other is not but a counterpart. And therefore if the lessor only seal, and not the lessee, yet it is as good [to bind him] as if both had sealed [and frequently a grantee may be bound by acceptance, as an estoppel:

1 Inst. 143, a.]; and, if there be any difference between the parts, the counterpart shall be made to agree with the principal, and it [the error] shall be deemed the misprision of the clerk." It follows that we must read the habendum here as expressing the real intention of the parties to the original lease that the term should enure for ninety-four years and a quarter, and the mention of the term in the reddendum may be treated as surplusage. I think we are bound so to deal with it; and, treating the reddendum as for 94¼ years, the lease will operate as creating a term of 94¼ years, and so all the covenants will apply consistently. Although, therefore, the case is not without difficulty, I think that is the true solution of it; and I agree with my Brother Brett that the defendant is entitled to judgment.

Judgment for the defendant.

Solicitor for plaintiff: *W. W. Hayne.*

Solicitors for defendant: *Mackeson, Taylor, and Arnould.*

MYERS *v.* HODGSON AND OTHERS. *June* 1.

Copyhold—Compulsory Enfranchisement—Death of Tenant before Confirmation of Award—Lord's Fine—4 & 5 Vict. c. 35; 15 & 16 Vict. c. 51; 21 & 22 Vict. c. 94.

A copyhold tenant died after proceedings instituted by him for a compulsory enfranchisement under the Copyhold Act, 1858 (21 & 22 Vict. c. 94), and before the confirmation of the award by the commissioners:—

Held, that the lord was entitled to have a new tenant on the roll and to a fine on his admittance:

Held, also, that the proceedings did not abate by the death of the first tenant.

ACTION by the plaintiff, as lord of the manor of Shenley Bury, in the county of Herts, to recover from the defendants 77*l.* alleged to be due from the defendants to the plaintiff as a fine payable upon their admission to certain copyhold tenements parcel of the manor. The following case was stated for the opinion of the Court:—

1. William Joseph Myers by his will dated the 15th of September, 1858, devised (inter alia) the manor of Shenley Bury, in the county of Herts, to Horatio Bland and James Dugdale and

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their heirs during the life of the plaintiff, Thomas Barron Myers, upon trust to permit him to have the possession of and receive and take the rents and profits of the same premises during his life or until the happening of certain events which have not yet happened. William Joseph Myers died on the 13th of November, 1858, seised of the said manor, and without having revoked or altered his will.

2. Under and by virtue of the said devise, the plaintiff had on the 27th of February, 1873, and still has, the legal freehold estate in, and then was and still is the lord of the said manor; but he has no power to enfranchise, and any consideration money payable for the compulsory enfranchisement of lands parcel of the said manor is under the said will payable to the said trustees upon the trusts for investment in the will mentioned.

3. On the 25th of October, 1872, William Brown, of Willesden, in the county of Middlesex, farmer, was admitted tenant on the rolls of the said manor to all that piece or parcel of land, formerly parcel of the waste of the manor, situate and being on Rowley Green, within the manor, containing by estimation, towards the west, in front next the road leading from Barnes to Shenley, 20 feet of assize, and in depth from west to east 150 feet of assize, and bounded by Rowley Green aforesaid on the north, east, and south; and also all that messuage or tenement thereupon erected and built, together with the appurtenances; to hold to the said William Brown, his heirs and assigns for ever, at the will of the lord, by copy of court roll, and according to the custom of the manor; and he paid the customary fines and fees upon such admission.

4. On the 27th of February, 1873, notice was given by William Brown to the plaintiff of his desire to enfranchise the said copyhold hereditaments pursuant to the Copyhold Acts.

5. On the 30th of July, 1873, the plaintiff and William Brown, in pursuance of the Copyhold Acts and the said notice, by writing under their hands appointed Sidney Longhurst Harding to be the valuer for both parties in the matter of the intended enfranchisement.

6. By his award, dated the 27th of September, 1873, S. L. Harding awarded the sum of 112*l.* 4*s.* as the sum to be paid by William Brown as the consideration money for such enfranchisement.

7. The valuer's award was by him forwarded on the 27th of September, 1873, to the copyhold commissioners, who on the 3rd of October, 1873, wrote to the steward that they would confirm such award at the expiration of a week from that date, and requesting the steward to fill up the usual form giving all the numerous particulars required for the guidance of the commissioners in the matter. This the steward duly sent to the copyhold commissioners on the 10th of October, 1873. William Brown died on the 14th of October, 1873, and the enfranchisement has not been completed, nor has the consideration money been paid, in consequence of the lord of the manor refusing to receive the same from the defendants under the circumstances herein appearing; but the defendants have paid the expenses incurred by the plaintiff with reference to the award.

8. William Brown died on the 14th of October, 1873, having by his will, bearing date the 8th of April, 1868, and certain codicils thereto, devised all his copyhold lands to the defendants. William Brown died seised of the said copyhold tenements, and without having revoked the said will and codicils, and the same were duly proved by the defendants on the 3rd of December, 1873. After the death of William Brown, questions of law arose between the plaintiff and the defendants as to the effect of such death upon the proceedings for enfranchisement, and as to whether the said proceedings had abated by reason of such death, and as to whether it was necessary that the defendants should take admission to the said copyhold tenements before the same could be enfranchised.

9. At a court held for the manor of Shenley Bury on the 8th of June, 1875, the defendants, with express reservation of their claim herein stated, and without payment of any kind, were admitted tenants on the roll of the manor to the said copyhold hereditaments, to hold to them, their heirs and assigns, at the will of the lord, by copy of court roll, and according to the custom of the manor.

10. By the custom of the manor, fines payable on the admission of copyhold tenants of the manor are arbitrary; and it is admitted that the plaintiff is entitled to recover in this action the sum of 77*l.* as a reasonable fine, if any fine were payable by the defendants on their said admission.

11. The 77*l.* was duly demanded from the defendants, and pay-

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ment thereof refused; and on the 26th of June, 1875, the plaintiff issued the writ of summons in this action.

The particulars of the plaintiff's claim indorsed upon the writ were as follows:—"1875. To amount of fines due upon admission of the defendants to certain tenements copyhold of the manor of Shenley Bury, in the county of Herts, 77*l.*"

12. The defendants contend that the notice by the tenant of his desire to enfranchise under the compulsory powers of the Copyhold Acts, followed by the appointment by both lord and tenant of a valuer, the award of the valuer, and its confirmation by the copyhold commissioners, constitute a valid contract of which specific performance can be enforced between the late copyhold tenant and the plaintiff, and that it was a contract for the sale to Brown of all the manorial rights and incidents of tenure affecting the land in question, that the lord of the manor is not entitled to disregard the proceedings under the Copyhold Acts, and therefore that no fine is payable.

13. The plaintiff contends,—1st, that, under the Copyhold Acts, the proceedings abated upon the death of Brown, and that, whether they did or not, and even if there were a binding contract, no enfranchisement could take place but to a tenant upon the rolls, and therefore that the admission was necessary and the fine payable,—2ndly, that, the proceedings having been compulsory, no contract can possibly be implied either with the plaintiff or with the trustees under the will of William Joseph Myers, the testator, who are necessary parties to the enfranchisement,—3rdly, that, if the contract were binding, and the trustees were bound to carry out the enfranchisement upon receiving the 112*l.* 4*s.*, this would not affect the present claim for a fine in respect of the admissions of the defendants upon the death of the copyhold tenant under the circumstances above stated,—4thly, that the right of the plaintiff to this fine is preserved by the second proviso of s. 1 of the Copyhold Act, 1852, 15 & 16 Vict. c. 51.

The question for the opinion of the Court is whether, under the circumstances above stated, the plaintiff is entitled to recover the 77*l.* from the defendants.

C. C. Scott, for the plaintiff. The question is whether, under the

circumstances disclosed in this case, the defendant is bound to be admitted and to pay a fine to the lord before the enfranchisement can take place. Sect. 1 of 15 & 16 Vict. c. 51, enacted that, "at any time after the next admittance to any lands which shall take place on or after the 1st of July, 1853, in consequence of any surrender, bargain and sale, or assurance thereof (except upon or under a mortgage in cases where the mortgagee is not in possession), or in consequence of any descent, gift, or devise, and whether such surrender, bargain and sale, or assurance shall have been made, passed, or executed, or such descent shall happen, or such gift or devise shall take effect before or after that day, it shall be lawful for *the tenant so admitted* or for the lord to require and compel enfranchisement in manner hereinafter mentioned of the lands to which there shall have been such admittance as aforesaid; provided that no such tenant shall be entitled to require such enfranchisement until after payment or tender of the fine or fines and of the fees consequent on such admittance: Provided also that if from any cause such enfranchisement shall not take place until some event shall have happened which may require a second or any subsequent admittance, such second or subsequent admittance shall be made, with all the rights incident thereto, as if this Act had not passed, and it shall be competent for the lord or tenant to require and compel enfranchisement upon or after such second or subsequent admittance in the manner hereby provided for enfranchisement upon the next admittance." The consideration to be paid to the lord for the enfranchisement was to be ascertained by the award of a valuer or valuers (s. 2), which was to be confirmed by the commissioners (s. 9); and by s. 11, the enfranchisement was to be by a deed executed by the lord, and the enfranchisement took effect from the time of the execution of the deed: "Provided always, that, in the meantime and until such enfranchisement shall so take effect, all the rights, remedies, powers, privileges, and conditions of and affecting the lord and tenant respectively in regard to such lands, with all the incidents of tenure, shall remain and continue unaffected." By 21 & 22 Vict. c. 94, s. 10, the award is to be confirmed by the commissioners, and such confirmation of the award is substituted for the

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deed of enfranchisement under the former Act. (1) Until confirmation by the commissioners there is no enfranchisement. The death of Brown having taken place before the confirmation of the award, if the proceedings are to go on, inasmuch as there can be no enfranchisement without a tenant, the defendants must be admitted and must pay the usual fine. The only instance in which admittance is dispensed with is that of the trustee in bankruptcy, and that is by express enactment: 32 & 33 Vict. c. 71, s. 22.

H. J. Hodgson, contrà. Under the circumstances disclosed in this case, admittance of the defendants was unnecessary, or, if necessary, the lord is not entitled to claim a fine. The commissioners were of opinion that by the death of Brown the whole proceedings abated. That, however, is not so; for, by 4 & 5 Vict. c. 35, s. 41, it was expressly enacted that "no proceedings of or before the said commissioners or assistant commissioner, or in any action, or in any case stated, or reference in pursuance of this Act, shall abate or cease by reason of the death of any person interested therein." All these Copyhold Acts are to be read together. Sect. 11 of 15 & 16 Vict. c. 51, though repealed by s. 2 of 21 & 22 Vict. c. 94, throws light upon the somewhat obscure language

(1) Sect. 10: "After the valuation has been made, or upon the receipt of the agreement of the parties, the commissioners, having made such inquiries concerning the circumstances of the case as to them shall seem fit, and having duly considered the applications made to them by the parties, may frame an award of enfranchisement in the terms of the valuation, and in such form as they shall provide, and may confirm the same; and such confirmed award shall have the same force and validity for all purposes of enfranchisement or otherwise as a deed of enfranchisement now has under the provisions of the Copyhold Acts, or would have had under any provision of the Copyhold Acts which is by this Act repealed; and for all purposes of declaring the amount, nature, and particulars of the compensation, and for attaching thereto the remedies provided by the Copyhold Acts, the said confirmed award shall have the same force and validity as an award made by valuers or an umpire under the provisions of the Copyhold Acts: Provided, nevertheless, that nothing herein contained shall affect the right of the steward for the time being of any manor to receive such sum of money by way of compensation or otherwise as he would have been entitled to if such enfranchisement had been effected by a deed of enfranchisement under the provisions of the Copyhold Acts or any of them: Provided also that the commissioners shall, fourteen clear days before confirmation of any such award, serve a copy of the same in the form in which it is proposed to be confirmed upon the steward of the manor of which the lands to be enfranchised are held."

of the last-mentioned Act. The proviso in s. 1 contemplates the death of a tenant whilst the proceedings for enfranchisement are going on, and enables a subsequent tenant to take them up.

[ARCHIBALD, J. Not without admittance; and such admittance is to be made "with all the rights incident thereto."]

The mode of proceeding to obtain an enfranchisement is now regulated by ss. 8 and 10 of 21 & 22 Vict. c. 94.

[BRETT, J. Suppose a tenant gives notice for an enfranchisement and then sells, would not that be an "event" contemplated by the second proviso of s. 1 (which is unrepealed)? To whom in that case would the deed have been made? To the new tenant, clearly.]

Scott, in reply, was stopped by the Court.

BRETT, J. In this case, William Brown, a tenant on the court-roll of the manor of Shenley Bury, in February, 1873, gave notice to the lord of his desire to enfranchise his copyhold hereditaments pursuant to the Copyhold Acts. A valuer was appointed, who on the 27th of September in that year made his award as to the sum to be paid to the lord as the consideration for the enfranchisement. The valuer's award was on the same day forwarded by him to the copyhold commissioners, who on the 3rd of October signified to the steward their intention to confirm the award at the expiration of a week from that day, and requested him to fill up the usual form giving the particulars required for their guidance. This was done on the 10th, and Brown died on the 14th, before the enfranchisement could be completed by the confirmation of the award by the commissioners under s. 10 of 21 & 22 Vict. c. 94. Thus, without any default on the part of the lord, or any undue delay on that of the commissioners, the enfranchisement became in abeyance. As devisees of Brown, the defendants became entitled to admittance to the copyhold tenement, and they were admitted (under protest) without paying any fine: and the question is, whether under the circumstances they were bound to pay a fine on such admittance.

I incline to agree with Mr. Hodgson, that, by virtue of the provision in 4 & 5 Vict. c. 35, s. 41, the death of Brown did not abate these proceedings, but that this compulsory enfranchisement must be continued upon the old notice and valuation, and that the com-

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missioners will be bound to confirm the award. It by no means follows from that that the present defendants are not to be admitted. I see nothing in any of the Acts to deprive the lord of his common-law right, or to enable these defendants to take advantage of the enfranchisement without becoming tenants of the manor and paying the usual fine for admittance. It would have required very express words to take away from the lord this right. The second proviso in s. 1 of 15 & 16 Vict. c. 51 seems to me to have foreseen the very event which has happened here,—"If from any cause such enfranchisement shall not take place until some event shall have happened which may require a second or any subsequent admittance, such second or subsequent admittance shall be made with all the rights incidental thereto, as if this Act had not passed," &c. I think that refers to a sale by the tenant after notice has been given and the proceedings to obtain an enfranchisement have been commenced, or to a devolution of title to the heir by the death of the tenant. In either case an event has happened which requires a second admittance. I apprehend that, if two successive tenants were to die pending the proceedings and before the completion of the enfranchisement by confirmation of the award, a second and a subsequent admittance would be necessary. The rights of the lord are, by the proviso in s. 11 of 15 & 16 Vict. c. 51, saved "until such enfranchisement shall so take effect," that is, until the award has been made and confirmed. It may be that, if anything has been unfairly done by the lord to delay the proceedings,—as, for instance, if, knowing that the tenant was in a dying state, he were to place impediments in the way of the completion of the enfranchisement,—the successor might have a remedy against him in equity. But nothing of the kind is suggested here. It seems to me that the death of Brown was one of the accidents or events contemplated by the legislature, and that by the plain and express words of the proviso the rights of the lord are saved. I am therefore of opinion that the plaintiff is entitled to the fine claimed, and to judgment on this case.

DENMAN, J. I am of the same opinion. I agree with my Brother Brett that s. 1 of 15 & 16 Vict. c. 51 is applicable to this case, and that it entitles the lord to a fine on the admittance of the

defendants; and I must also add that I am strongly of opinion that s. 11, though repealed by s. 2 of 21 & 22 Vict. c. 94, still applies by virtue of the provision in s. 10 of the last-mentioned Act. The object of that Act was to substitute a new mode of enfranchisement, viz. by award and confirmation by the commissioners, for the old deed of enfranchisement. Sections 8 and 9 give the mode of procedure, and then comes s. 10, which enacts that "such confirmed award shall have the same force and validity for all purposes of enfranchisement or otherwise as a deed of enfranchisement now has under the provisions of the Copyhold Acts, or would have had under any provision of the Copyhold Acts which is by this Act repealed." Now, under the former Acts, the lord's rights remained unaffected until the execution of the deed of enfranchisement; and I think the provisions of s. 11 of 15 & 16 Vict. c. 51 still apply so as to produce the same effect as to the award of the commissioners, though it is unnecessary to decide this expressly, because I am clearly of opinion that s. 1 of that Act applies. I therefore think the plaintiff is entitled to judgment.

ARCHIBALD, J. I am of the same opinion. It is unnecessary to go further than to found our opinion upon s. 1 of 15 & 16 Vict. c. 51, which expressly saves the rights of the lord, "if from any cause such enfranchisement shall not take place until some event shall have happened which may require a second or subsequent admittance." This,—the death of the tenant,—is an event which requires a second admittance, and consequently the lord is entitled to a fine in this case. I also think the proceedings for enfranchisement are still alive, and may be continued.

Judgment for the plaintiff.

Solicitor for plaintiff: *J. R. Wood.*
Solicitor for defendants: *C. H. Hodgson.*

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May 1.

PARKER *v.* THE SOUTH EASTERN RAILWAY COMPANY.

Railway Company—Bailment—Deposit of Property in Cloak-room—Ticket—Condition indorsed thereon—"See Back."

5 C.P.D. 3

On the deposit of articles at the cloak-room at a railway-station, a charge is made of 2*d.* for each, and the depositor receives a ticket on the face of which is printed the times of opening and closing the cloak-room, and the words "See Back;" and on the back there is a notice that "the company will not be responsible for any package exceeding the value of 10*l.*" A placard, upon which is printed in legible characters the same condition, is also hung up in a conspicuous place in the cloak-room.

The plaintiff deposited his bag (of the value of 24*l.* 12*s.*) in the defendants' cloak-room, paid 2*d.*, and received a ticket. The bag was lost or stolen. In an action to recover its value, the plaintiff swore that, on receiving the ticket, he placed it in his pocket without reading it, imagining it to be only a receipt for the money paid for the deposit of the article; that he did not see the condition at the back of the ticket; nor did he see the notice hung up in the cloak-room. The judge left two questions to the jury,—1. Did the plaintiff read or was he aware of the special condition upon which the article was deposited? 2. Was the plaintiff, under the circumstances, under any obligation, in the exercise of reasonable and proper caution, to read or to make himself aware of the condition?

The jury answered both questions in the negative, and a verdict was entered for the plaintiff:—

Held, that, upon these facts and findings, the company were responsible for the loss of the bag.

Mere notice, not brought home to and assented to by the depositor, is not enough in such a case to relieve the company from liability.

Henderson v. *Stevenson* (Law Rep. 2 H. L., Sc. 470) commented upon.

See Thorne v. Heard and Sc 19 C.P.D. 456 C.A.

ACTION against the South Eastern Railway Company for the value of a bag and its contents lost to the plaintiff through the negligence of the company's servants.

The cause was tried before Pollock, B., at Westminster on the 27th of February last. The facts were as follows:—The plaintiff was a passenger by the defendants' railway. On arriving at Charing Cross station he deposited his portmanteau and travelling-bag in the cloak-room of the defendants, paid 4*d.*, and received from the attendant a ticket on the face of which was the following:—

South Eastern Railway. Charing Cross Station.
2 articles.

The public are informed that the office for the receipt and delivery of left luggage will be open on week days at 9 a.m., and closed at 11 p.m., and on Sundays from 7 a.m. to 11 a.m., and from 12.30 to 10 p.m.

After the expiration of seven days, property of this kind not taken away by the owner must be sent to the unclaimed property office.

3386. L.B. 5th April, 1875.

[See Back.]

At the back of the ticket was a notice, as follows:—

This company will not be responsible for articles left by passengers at the station unless the same be duly registered, for which a charge of 2*d.* per article will be made, and a ticket given in exchange; and no article will be given up without the production of the ticket, or satisfactory evidence of the ownership being adduced. A charge of 1*d.* per diem in addition will be made on all articles left in the cloak-room for a longer period than twenty-four hours. The company will not be responsible for any package exceeding the value of 10*l.*

The plaintiff on his return to the station a few hours after he had so deposited them, presented the ticket and demanded the portmanteau and bag. He received the former, but the latter (which with the contents was of the admitted value of 24*l.* 10*s.*) could not be and never was found.

The answer relied on by the company was the condition printed at the back of the ticket, and also the fact that a notice to the same effect was printed in legible characters on a placard which was publicly exhibited in a conspicuous part of the cloak-room. The plaintiff denied having seen either; saying that, on receiving the ticket, he placed it in his pocket without reading it, as he imagined it to be only a receipt for the money paid for the deposit of the articles. He admitted, however, that he had received such tickets before.

The learned judge, having had his attention called to *Henderson* v. *Stevenson* (1), left two questions to the jury,—1. Did the plaintiff read or was he aware of the special condition upon which the articles were deposited? 2. Was the plaintiff, under the circumstances, under any obligation, in the exercise of reasonable and proper caution, to read or to make himself aware of the condition? (2)

The jury answered both these questions in the negative, and the learned Baron thereupon directed judgment to be entered for the plaintiff for the amount claimed, reserving leave to the defendants to move to enter judgment for them.

(1) Law Rep. 2 H. L., Sc. 470.

(2) See *Symonds* v. *Pain*, 6 H. & N. 709; 30 L. J. (Ex.) 256.

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Feb. 1. *Willis* moved to set aside the judgment entered for the plaintiff, and enter judgment for the defendants, "on the ground that, upon the facts admitted at the trial, and notwithstanding the findings of the jury, the judge ought to have entered judgment for the defendants," or for a new trial, "on the ground of misdirection in telling the jury that they should find a verdict for the plaintiff if they thought that, considering the plaintiff's knowledge of the world and of life, and the nature and character of the transaction, he had used proper caution in not having read the document given to him at the time of the deposit." [He cited *Van Toll* v. *South Eastern Ry. Co.* (1), *Lewis* v. *M'Kee* (2), and *Stewart* v. *London and North Western Ry. Co.* (3)]

Prentice, Q.C., and *F. Pollock*, shewed cause. The ticket in itself cannot amount to a contract: there must be an assent by both parties to constitute a valid contract; and here it must be taken that the plaintiff never had his attention called to the words printed on the back of the ticket, and that he never read them. *Henderson* v. *Stevenson* (4) is precisely in point. There, a ticket having on its face only the words "Dublin and Whitehaven" was given to a passenger, who, without looking at it, paid for it and went on board. In an action by the passenger against the steam-packet company for the loss of his luggage, it was held to be no defence on the part of the company that on the back of the ticket there was an intimation that they were not to be liable for losses of any kind or from any cause. The language of Cairns, L.C., and of all the learned lords who delivered judgments in that case is conclusive in favour of the plaintiff here.

[LORD COLERIDGE, C.J. There was no reference on the face of the ticket there to the conditions printed on the back of it. It must be matter of evidence in each case.]

In *Van Toll* v. *South Eastern Ry. Co.* (1), the Court were to draw such inferences from the facts as a jury might have done, and the inference they drew was that the plaintiff knew of the special terms on which the bag was deposited, and assented to be bound by them. The same remark applies to *Stewart* v. *North*

(1) 12 C. B. (N.S.) 75; 31 L. J. (C.P.) 241.
(2) Law Rep. 4 Ex. 58, 60.
(3) 3 H. & C. 135; 33 L. J. (Ex.) 199.
(4) Law Rep. 2 H. L., Sc. 470.

Western Ry. Co. (1); and *Zunz* v. *South Eastern Ry. Co.* (2) is disposed of by the observations of Lord Chelmsford in *Henderson* v. *Stevenson*. (3)

[LORD COLERIDGE, C.J. Pollock, C.B., puts it thus in *Stewart* v. *North Western Ry. Co.* (4): "As to the finding of the jury that the plaintiff was not aware of the contents of the time-bills, the rule applies, that a person must be presumed to know what he has the means of knowing, whether he avails himself of those means or not." If that is to be taken to be a proposition of law, it is distinctly overruled by the judgment in the House of Lords. It may be that it is a matter which may be fairly pressed before a jury.]

Willis and *Bremner*, in support of the order. *Henderson* v. *Stevenson* (5) does not decide this case. It may well be that that which is at the back of the document and is not seen is not part of the contract. But it is otherwise where there is on the face of the document given to the party a distinct reference to conditions printed on the back of it. In *Van Toll* v. *South Eastern Ry. Co.* (6) the facts were as nearly as possible the same as the facts here, and the form of the ticket was the same. Byles, J., says (7): "Suppose, instead of a notice limiting the liability of the bailees, this had been a notice to quit, or a notice of the dishonour of a bill, or a notice of objection to a vote for a county or borough, it would be a strong thing to say that a man might put such a notice into his pocket, and say he never read it." "Where a notice of this kind is given, it seems to me there may be two sorts of assents. One is, where the terms are read by the bailor, and then he puts the document into his pocket, and so assents to it expressly. But if, without reading it, he chooses to put it into his pocket, though he does not know one word it contains, it seems to me that he assents to it implicitly, whatever the terms may be, on two conditions. One of those conditions is, that the terms contained in the notice should be reasonable."

[LORD COLERIDGE, C.J. Nobody seems to have asked the

(1) 3 H. & C. 135; 33 L. J. (Ex.) 199. 10 Jur. (N.S.) 805
(2) Law Rep. 4 Q. B. 539.
(3) Law Rep. 2 H. L., Sc. 470, 477.
(4) 3 H. & C. 135, 138; 33 L. J. (Ex.) 199.
(5) Law Rep. 2 H. L., Sc. 470.
(6) 12 C. B. (N.S.) 75; 31 L. J. (C.P.) 241.
(7) 12 C. B. (N.S.) at p. 87.

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plaintiff whether she had read the notice or not. The Lord Chief Justice, however, seems to have assumed that she had.]

The cases of *York, Newcastle, and Berwick Ry. Co.* v. *Crisp* (1) and *Van Toll* v. *South Eastern Ry. Co.* (2) were cited in *Lewis* v. *M'Kee* (3), and Willes, J., delivering the judgment of the Exchequer Chamber, expressly says that the Court threw no doubt on the principles acted upon in those cases,—observing that, "in those cases, as part of the contract, and as expressing or intended to express the terms on which the parties were dealing, a written document was handed from the one to the other under circumstances in which, without negligence, the person receiving it could not be unaware of what the person delivering it meant to bind himself to." The true question for the jury, after the first, was, whether the plaintiff knew or had the means of knowing that the company were receiving the bag upon some special printed terms. If they found that affirmatively, they should have been directed to find for the defendants, on the ground that the plaintiff had assented to those terms without reading them, or that there was mutual error, and that the plaintiff's claim as a simple bailor was not made out.

[LORD COLERIDGE, C.J. The plaintiff did not know that the terms upon which the company received his property were those printed on the back of the ticket. The jury have so found, and also that he was not negligent in not knowing it.]

They should have been asked whether he knew that there were special terms. [*Kerr* v. *Willan* (4) and *Rowley* v. *Horne* (5) were also cited. (6)]

LORD COLERIDGE, C.J. In this case the plaintiff sues the South Eastern Railway Company for damages for the loss of a portion of his luggage, he having been a passenger by their railway. The article in question (a travelling-bag) had been delivered to the company at the cloak-room of their station at Charing Cross, and

(1) 14 C. B. 527; 23 L. J. (C.P.) 125.

(2) 12 C. B. (N.S.) 75; 31 L. J. (C.P.) 241.

(3) Law Rep. 4 Ex. 58, 61.

(4) 6 M. & S. 150.

(5) 3 Bing. 2.

(6) At the close of his argument, *Willis* stated that a similar question was pending in the Queen's Bench Division, and that time had been taken for consideration. *Harris* v. *Great Western Ry. Co.*, 1 Q. B. D. 515.

2*d.* had been paid upon its being so deposited, and a ticket given to the plaintiff which upon the face of it purported to be an acknowledgment that the company had received the article. At the bottom of this ticket were printed the words "See back," and, when the back is looked at, certain conditions are found printed thereon, one of which is, "The company will not be responsible for any package exceeding the value of 10*l.*" It was admitted that the bag in question did exceed the value of 10*l.* At the trial before Pollock, B., the plaintiff swore that, when he received the ticket, he put it into his pocket and did not read it, considering it to be a mere memorandum or receipt for the money paid, and that he did not see any placard hung up in the cloak-room. He added that, having threatened to take proceedings against the company, his attention was for the first time called to the indorsement on the ticket. The learned Baron put two questions to the jury, viz. 1. Did the plaintiff read or was he aware of the special conditions upon which the articles were deposited? 2. Was the plaintiff, under the circumstances, under any obligation, in the exercise of reasonable and proper caution, to read or to make himself acquainted with the conditions? The jury answered both these questions in the negative. The question is whether, upon these facts and findings the defendants are responsible for the loss of the plaintiff's bag. I am of opinion that they are.

The question turns upon certain elementary propositions of the law of contract, qualified by some decisions. It seems to me to be impossible to say that there is no contract, supposing the fact to be that the condition printed on the back of the ticket was not brought home to one of the contracting parties. The facts which are relied on as evidence of a contract are these:—The plaintiff hands in a bag to a servant of the company at a place called the cloak-room, and pays 2*d.*, receiving in return a paper. It is impossible to say that, because there are on the back of that paper conditions which the company intend to form the basis of a contract, but which are not brought to the knowledge of the plaintiff, therefore there is no contract. The contract is the ordinary contract of bailment; and the company are bound to take care of the article intrusted to them. But it is said that,

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though there may be such a contract in the case supposed, at any rate that is not so here, because the company all along contracted to be liable only upon certain terms of which this is not one. It is further said that the circumstances were such that no one could without being guilty of negligence be unaware of the contents of the document given out as forming the basis of the contract, and that, as the plaintiff chose, without taking reasonable care to see what was on the paper, to leave the bag, he must be assumed to have assented to be bound by conditions which were fairly brought to his knowledge, and that the company have therefore a right to rely on those conditions as forming part of the contract.

Now, it seems to me to be impossible, in common sense or upon the authority of any of the cases, to lay down any definite and fixed line with regard to which it can be said that a railway company are bound or not bound by such a document as this. It must in each case be a question of evidence and common sense. There are cases, no doubt, where, when a document has been handed to a man, he must be taken to have acquainted himself with its terms, and, if he has not in fact done so, it is his own fault, and he is bound by them. Take the case of a sale of land: a document is handed to the intending purchaser which contains the conditions of sale. Having had an opportunity of doing so, it must be assumed as against him that he has read the conditions, and assented to deal with reference to them. Can it be said that that is the case with a document like this? In every case of this kind it must be matter of evidence whether or not the conditions were so brought to the knowledge of the party sought to be bound as to satisfy a jury that those were the terms upon which both were contracting. That is the principle upon which the House of Lords decided the recent case of *Henderson* v. *Stevenson*. (1) That case is on all fours with the present, with this exception, viz. that there the conditions were printed on the back of the ticket, without any reference to it on the face of the document; whereas here the ticket had on its face the words "See back." I do not, however, find that the reasoning of the law Lords in giving judgment in that case is

(1) Law Rep. 2 H. L., Sc. at p. 470.

satisfied by placing it on that distinction. The Lord Chancellor, it is true, after pointing out the particular condition at the back of the document, goes on to say: "With regard to the knowledge of the respondent of what was printed upon the back of the ticket, your Lordships have his own evidence, which is not controverted, and upon which he does not appear to have been challenged or cross-examined, that in point of fact he did not read and did not know what was printed upon the back of the ticket,"—words which seem to have been present to the mind of my Brother Pollock when he put the first question to the jury—"*There was nothing upon the face of the ticket referring him to the back, and there was nothing said by the clerk who issued the ticket directing the respondent's attention to what was printed upon the back.* Your Lordships therefore may take it as a matter of fact that the respondent was not aware of that which was printed upon the back of the ticket; consequently, so far as any intelligent knowledge of what was there printed is concerned, he cannot be taken intelligently to have agreed to the terms printed upon the back of the ticket." I understand his Lordship to mean that the evidence satisfied him that the terms by which the company intended the respondent to be bound were not brought to his notice: the absence of reference on the face of the ticket to the conditions on the back, and the absence of a reference to those conditions when the ticket was taken, were circumstances which induced him to come to the conclusion that the conditions were not brought to the notice of the passenger; but I cannot find that he anywhere says that, if those words of reference had been on the face of the ticket, he would have come to a different conclusion. His Lordship goes on to say (1) that he entirely agrees with the observation of the Lord Ordinary, that, "in a case like this, mere notice, not brought home to and assented to by the pursuer, is not enough." And he proceeds: "The question does not, as it seems to me, depend upon any technicality of law or upon any careful examination of decided cases. It is a question simply of common sense. Can it be held that, when a person is entering into a contract containing terms which de facto he does not know, and as to which he has received no notice, that he ought to inform himself upon

(1) Law Rep. 2 H. L., Sc. at p. 475.

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them? It appears to me to be impossible that that can be held." From this I infer that, in his Lordship's opinion, if a notice was given, but not brought home to the plaintiff, that would not be enough. I find nothing in any of the other judgments to diminish the force of those observations. Lord Chelmsford (1) and Lord Hatherley (2) both hold similar language: and Lord O'Hagan says (3): "Proof of the respondent's knowledge and assent might have been given in various ways. In certain circumstances, denial of them might not be permissible; in others, a jury or a Court might be satisfied of their existence from antecedent dealings, notoriety of custom, publication of notices, verbal communications, and so forth; but I agree with the Lord Chancellor that the mere receipt of a ticket, under such circumstances, and with such an indorsement as we have before us, is not shewn by the authorities cited at the Bar to furnish per se sufficient evidence of such assent or knowledge."

Regard being had to the common and ordinary course of business, it seems to me to be reasonable that a man receiving such a ticket as this should look upon it as a mere voucher for the receipt of the package deposited, and a means of identifying him as the owner when he sought to reclaim it: and I think the jury were quite right in finding that the plaintiff in this case did not read the special condition, nor was he, under the circumstances, under any obligation to read it.

It is said that there are cases which were not cited upon the argument of *Henderson* v. *Stevenson* (4) in the House of Lords, where the Courts had come to a different conclusion. There are, no doubt, cases where a different conclusion in point of fact has been arrived at. In *York, Newcastle, and Berwick Ry. Co.* v. *Crisp* (5) and *Van Toll* v. *South Eastern Ry. Co.* (6), under the circumstances there appearing, this Court held the companies to be exempt from liability, and the plaintiffs to be fixed with notice of the special terms of the contract, because there was evidence that they knew of facts from which they must be taken to have

(1) Law Rep. 2 H. L., Sc. at p. 476.
(2) Law Rep. 2 H. L., Sc. at p. 478.
(3) Law Rep. 2 H. L., Sc. at p. 480, 481.
(4) Law Rep. 2 H. L., Sc. 470.
(5) 14 C. B. 527; 23 L. J. (C.P.) 125.
(6) 12 C. B. (N.S.) 75; 31 L. J. (C.P.) 241.

known what those special terms were. But in these and in numerous similar cases it was treated as a question whether upon the facts proved the jury could find or the Court infer that the limitation of the contract relied on by the railway company was brought home to the knowledge of the defendant as a term of the contract. I find these cases thus summarized by Willes, J., in *Lewis* v. *M'Kee* (1): "In those cases, as part of the contract, and as expressing or intended to express the terms on which the parties were dealing, a written contract was handed from the one to the other under circumstances in which, without negligence, the person receiving it could not be unaware of what the person delivering it meant to bind himself to." It is, therefore, upon the circumstances of those cases and the findings of the jury upon the facts that that learned judge relies as distinguishing them from the case before him. In the present case it is found that the plaintiff was unaware of the conditions printed on the back of the ticket, and that he was so unaware without any negligence on his part: therefore, upon the two grounds upon which Willes, J., relies in dealing with those cases, I think this case is distinguished by the findings of the jury. I accept those decisions upon the ground stated by that learned judge. "If," he says (2) "one person seeks to impose on another a liability by contract, but chooses to abstain from reading the terms of the document in which the liability is sought to be expressed, he is in this dilemma: either he has chosen to accept the terms without taking the trouble of informing himself what they are; or if not reading, he did not assent to the terms proposed, then no action lies, because one side has intended one thing, and the other a different thing, and the transaction is vitiated by mutual error. The first of these alternatives is probably the practical conclusion at which a jury would arrive." It seems to me that the cases which have been relied on as distinguishable from and as not governed by *Henderson* v. *Stevenson* (3), and as governing this case, are, when looked at, in accordance with the decision in that case, and distinguishable from this. It seems to me that no sound distinction can be taken between a condition on the face of the ticket and

(1) Law Rep. 4 Ex. 58, 61. (2) Law Rep. 4 Ex. at p. 61.
(3) Law Rep. 2 H. L., Sc. 470.

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one printed on the back of it. In each case the question must equally be one of circumstances and construction,—was the plaintiff unaware of the condition upon which the company consented to accept his deposit, and, if he was, was it through his own culpable negligence that he was ignorant of it? If he was unaware of it without any negligence on his part, he cannot be bound by it. The jury in this case have found that the plaintiff was unaware of the condition, and that he was guilty of no negligence. It seems to me that the proper questions were left to the jury, and that their findings were warranted by the evidence. The case is really within the doctrine upon which the learned law Lords proceeded in *Henderson* v. *Stevenson*. (1) I therefore think the rule must be discharged.

BRETT, J. The plaintiff took to the cloak-room at the defendants' station a portmanteau and a bag, and gave them to the servants of the defendants to keep them safely and to restore them to him on demand, and he paid for each 2*d*. for that service. Upon his so depositing his property and making that payment, the porter handed him a ticket. Upon the face of that ticket there was nothing to modify the ordinary bailment except the words "See back." It turned out that on the back of the ticket there were certain conditions, amongst others one which provided that "the company will not be responsible for any package exceeding the value of 10*l*." The bag, the value of which considerably exceeded 10*l*., was lost. Under these circumstances, the plaintiff brings his action against the company for the non-return of the bag, founding his claim upon the ordinary contract of bailment where the service is to be paid for. The answer set up by the defendants is, that the contract they entered into was not the ordinary contract of bailment, but a special contract, with a special limitation of the ordinary contract. This is not a case in which the terms of the contract need be in writing. It is a case in which, if no document at all passed between the parties, there would be a contract implied from the handing over the article and payment of the money, viz. the ordinary contract of bailment; and it is contended on the part of the plaintiff, that, unless it can

(1) Law Rep. 2 H. L., Sc. 470.

be shewn that his attention was called at the time of the delivery of the ticket to him to the limitations printed on the back thereof, he is not bound by them, but is at liberty to assume that the contract upon which he deposited his property was the ordinary contract of bailment. Now, it is not found or suggested that the plaintiff's attention was called to the conditions indorsed upon the ticket. The jury found that the defendant did not read nor was he aware of the special conditions upon which the articles were deposited,—that is, that he neither saw nor read the indorsement or the placard. They further found that the circumstances under which the ticket was handed to him were such that the plaintiff was not guilty of any want of proper caution in failing to make himself acquainted with the supposed conditions.

The contention on the part of the defendants is, that if, in making such a contract, that is, a contract of bailment, a document passes between the contracting parties, it is the duty of the person who receives it to read it; that, if there is nothing on the face of it to limit the ordinary liability of the bailee, the bailor may properly say that he is only bound by what he finds there; but that, if there is a reference on the face of it to something written or printed at the back, he is bound to look at the back of the document, and it is to be presumed as against him that he did so. The defendants raise that argument upon an order to enter judgment for them, on the ground that, upon the facts admitted, the learned judge ought to have entered judgment for them; that is, that, assuming the findings of the jury to be correct, the plaintiff ought to have read the conditions on the back of the ticket, and is bound by them as if he had read them. They also ask for a new trial on the ground of misdirection, which involves the same point.

As I have already intimated, in cases where the contract must be in writing, the party contracting is bound to read it, and must be assumed to have done so. But, where the contract arises only by implication from the facts, and no document in writing is necessary, or where the document may or may not contain terms of limitation, I am aware of no case which decides, as matter of law, that the person to whom it is handed is obliged to make him-

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self acquainted with its terms, and is bound by them as if he had done so. If the jury find that he did read the document, or that the circumstances were such that in the ordinary course of business it might fairly be assumed that he had read it, then of course he would be bound by it, But I apprehend it is open to the jury to say that he may have taken the document as one which would contain nothing to call for special attention. They might well say that people would naturally take a ticket of this sort as a mere voucher to be produced on demanding back the article deposited, and are not bound to expect it to contain any special limitation of the contract upon which the deposit was made, and so the omission to read it was not an act of culpable negligence. It may be that, if the defendants could shew that the plaintiff here had read the face of the ticket, a jury would be warranted in saying he was guilty of negligence in not accepting the invitation to look at the back of it. The case of *Henderson* v. *Stevenson* (1) has been relied on as shewing that the recipient of a ticket is bound to read the face of it, but that, if there be no reference thereon to the back, he is not guilty of negligence in omitting to read that which is on the back. But that case, as I read it, goes much further. It came before the House of Lords upon an appeal from a Scotch Court upon a state of facts which shewed that the pursuer was guilty of no negligence in not reading what appeared on the back of the ticket which he received in exchange for the passage-money. It is true that there the face of the ticket had on it no reference to the back: but the Lord Chancellor treats the question as one of evidence and common sense; and his expressions go the full length of holding the same rule to apply to the front as to the back of the document, viz. that, in the absence of evidence to shew that the attention of the party is called to the alleged limitation of the ordinary contract of bailment, such limitation cannot be implied from the mere delivery of the ticket. I think that case is conclusive to shew, that, as matter of law, there is no obligation on the party, under circumstances like these, to look either at the face or at the back of the ticket. *Lewis* v. *M'Kee* (2) has been relied upon as in favour of the defendants' view: but I must confess it seems to me

(1) Law Rep. 2 H. L., Sc. 470. (2) Law Rep. 4 Ex. 58.

to be strongly in the plaintiff's favour. There, goods were shipped under a bill of lading in the usual terms. The consignee of the bill of lading, being sued for the freight, pleaded that, before the time had arrived for the delivery of the cargo, he indorsed the bill of lading in these words "Deliver to W. & K. or order, looking to them for all freight, dead freight, and demurrage, without recourse to us," and that the plaintiffs accepted the indorsement, and in pursuance of it delivered the goods to W. & K., and not to the defendant. At the trial it was admitted that the defendant would have been liable to W. & K. for any freight paid by them. There was a conflict of evidence as to whether the indorsement was or was not on the bill when it was shewn to the captain, but the captain swore he did not see it. Martin, B., directed the jury that it was immaterial whether the indorsement was or was not on the bill unless the captain saw it, and that the onus lay on the defendant of proving that the captain saw and assented to it. A verdict having been found for the plaintiffs, the Court of Exchequer discharged a rule for a new trial on the ground of misdirection, and that ruling was affirmed by the Court of Error, where it was held that, the defendant having been at the time of the alleged indorsement liable for the freight, and admitting that he was still substantially liable, he was bound to prove an assent on the part of the plaintiffs discharging him from that liability, and that assent would not be proved by shewing that the indorsement was on the bill when it was presented to the captain, without proving that the captain in fact assented to it. Willes, J., in delivering the judgment of the Court, distinguishes the case in hand from *York, Newcastle, and Berwick Ry. Co.* v. *Crisp* (1), and *Van Toll* v. *South Eastern Ry. Co.* (2)

As to *Van Toll* v. *South Eastern Ry. Co.* (2) and the other cases relied on for the defendants, they are distinguishable, on the ground that the Court, having power to draw inferences, drew the inference that, on the facts proved or admitted, there had been no negligence; whereas here, as in *Henderson* v. *Stevenson* (3), the Court is not at liberty to draw inferences, the question of negli-

(1) 14 C. B. 527; 23 L. J. (C.P.) 125.

(2) 12 C. B. (N.S.) 75; 31 L. J. (C.P.) 241.

(3) Law Rep. 2 H. L., Sc. 470.

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gence having been left to the jury, and they having negatived negligence.

We have been asked to suspend our judgment in this case, because it is said that there is a similar case pending in the Queen's Bench Division, in which the Court has taken time to consider its judgment. If I had thought that the circumstances of that case were really the same as those of the present case, I should have felt inclined for my part to reserve my opinion: but I do not find that they are so. That case was tried before Baron Pollock (the same learned judge who tried this case) without a jury, and he reserved the question for the Court, giving them full power to draw inferences of fact. (1) But here, unless we find that there has been a misdirection, or that upon the facts proved the judgment ought to have been entered for the defendants notwithstanding the findings of the jury,—there being no motion for a new trial on the ground that the verdict was against the weight of evidence,—we are bound by the finding of the jury that the plaintiff was guilty of no negligence or want of reasonable care in abstaining from looking at the ticket.

Upon the whole, therefore, I think, in obedience to the decision of this Court in *Van Toll* v. *South Eastern Ry. Co.* (2) and of the House of Lords in *Henderson* v. *Stevenson* (3), we are bound to discharge this order.

LINDLEY, J. I am of the same opinion. The contract, if any, was the ordinary contract of bailment, or the special contract to be found on the back of the ticket. The jury having negatived the latter, it follows that the contract was the ordinary contract of bailment. It has been urged that there is no contract at all, because, assuming that the plaintiff did not look and was not bound to look at the special conditions indorsed on the ticket, the parties were not at one. But, on the finding of the jury, I think we cannot say that the defendants did not accept the article, to be taken care of by them, without any special terms. *Henderson* v. *Stevenson* (3), therefore, is undistinguishable from this case, except

(1) *Harris* v. *Great Western Ry. Co.*, 1 Q. B. D. 515.

(2) 12 C. B. (N.S.) 75; 31 L. J. (C.P.) 241.

(3) Law Rep. 2 H. L., Sc. 470.

for the words "see back," which did not appear on the face of the ticket in that case. But the findings here make that distinction immaterial. After the conclusions of fact which the jury have drawn, it is, upon the authority of that case, quite immaterial whether the special terms relied on were on the front or on the back of the ticket.

Order discharged.

Solicitor for plaintiff: *G. W. Digby.*
Solicitor for defendants: *W. R. Stevens.*

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May 20.

Mayor's Court of London Procedure Act, 1857 (20 & 21 *Vict. c. clvii*), *s.* 48—*Setting aside a Judgment removed into a Superior Court—Want of Jurisdiction—Prohibition—Motion by Defendant.*

Sect. 48 of the Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii), enacts that a judgment removed from that court to a superior Court shall have the same force and effect as a judgment recovered in the superior Court:—

Held, that it is competent to the Court to which such judgment is so removed to set it aside, if satisfied that it was obtained in a matter over which the inferior court had no jurisdiction.

A prohibition may be moved for by the defendant himself, where the Court is satisfied that the inferior court is proceeding without jurisdiction.

Baker v. *Clark* (Law Rep. 8 C. P. 121) explained.

A JUDGMENT having been obtained against the defendant in the Mayor's Court, London, and removed into this Court pursuant to s. 48 of the Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii (1),

(1) Which enacts that, "In every case where final judgment shall have been obtained in the Mayor's Court, and also in every case where any rule or order shall have been made by the court whereby any sum of money, or any costs, charges, or expenses shall be payable to any person, any writ of execution upon such judgment, or any rule or order so made by the court, shall be sealed by the sealer of the writs of any of the superior Courts, upon a præcipe of the same being lodged with him, together with an affidavit verifying the judgment or order, and that the same remains unreversed and unsatisfied; and immediately thereupon such writ of execution and such judgment, rule, or order shall become and be of the same force, charge, and effect as a writ of execution or judgment recovered in or a rule or order made by such superior Court, and all the reasonable costs and charges atten-

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E. Pollock, on behalf of the defendant, obtained an order to shew cause why the judgment should not be set aside, and why a writ of prohibition should not issue to that court to prohibit further proceedings therein against the defendant, on the ground of want of jurisdiction.

Kemp shewed cause. It may be conceded that originally there was no jurisdiction in the Mayor's Court to entertain this action, and the defendant might have obtained a prohibition. But this Court has no power to set aside a judgment of the Mayor's Court; it can only prohibit further proceedings upon it. If after the removal it is to be treated as a judgment of this Court, the irregularity is in the inferior court, and the remedy should be sought there: *Williams* v. *Bolland.* (1) The decision in that case proceeded upon a judgment of Coleridge, J., in *Sims* v. *Count de Wints.* (2) The question there arose upon a judgment removed into the Queen's Bench under 1 & 2 Vict. c. 110, s. 22, the language of which is almost identical with that of the section now under consideration; and the learned judge said: "I think it must be taken that into all irregularities in the course of the proceedings the court below is the proper and exclusive tribunal of inquiry; that, where there is error in the judgment itself, a different recourse may be had in the regular way to the superior Court; but that, when the judgment alone is removed into the superior Court under this section, it is removed for the purpose of execution only; and that we have nothing to do with it but to enforce it."

[BRETT, J. Here, the defect is want of jurisdiction, not mere irregularity.]

There is a further answer to this rule: it is moved on behalf of the defendant himself, whereas, according to the uniform practice

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dant upon such sealing shall be recovered in like manner as if the same were part of such judgment or rule or order: Provided always that no such judgment or rule or order when so removed as aforesaid shall affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, any further than the same would have done if the same had been a judgment, rule, or order of the Mayor's Court, unless and until a writ of execution thereon shall be actually put into the hands of the sheriff or other officer appointed to execute the same."

(1) Ante, p. 227.

(2) 8 Dowl. 646.

of this Court since *Cox* v. *Mayor of London* (1), it ought to have been moved at the instance of a stranger: see *Baker* v. *Clark.* (2)

[BRETT, J. That notion was dispelled by the unanimous opinion of this Court in *Worthington* v. *Jeffries* (3), and by the decision of Jessel, M.R., in *Jacobs* v. *Brett* (4), where the Master of the Rolls, speaking of *Baker* v. *Clark* (2), observes, "There was merely an intimation by the Court that the prohibition had better be taken out in the name of a stranger, which was accordingly done the next day:" and he adds,—"One of the judges who decided that case has since expressed an opinion anything but favourable to *Manning* v. *Farquharson.*" (5)]

Edward Pollock in support of the order was stopped.

LORD COLERIDGE, C.J. Here, an attempt has been made to enforce in this Court a judgment obtained in the Mayor's Court, London, in a matter over which that court had no jurisdiction; and the contention before us has been that, though that court might have had no jurisdiction, and might therefore have been prohibited from proceeding, yet that the plaintiff having recovered a judgment, and that judgment having been removed into this Court under s. 48 of 20 & 21 Vict. c. clvii, we are bound to give effect to that judgment. All that that section enacts is, that a judgment of the Mayor's Court, when removed into this Court, shall have the same force and effect as a judgment recovered in the superior Court. The Court will deal with a judgment so removed as with any other judgment. That it is the result of a proceeding in a court which has no jurisdiction is a perfectly good ground for setting aside a judgment so improperly obtained: it is not mere irregularity. To hold otherwise would be construing the enactment in a manner contrary to common sense and reason. In the case cited, *Williams* v. *Bolland* (6), which arose upon the words of a statute which are in terms very similar to the enactment in question, this Court refused to set aside a judgment which had been removed hither from the Passage Court at Liverpool, on the ground that the objection, which was of a mere irregularity,

(1) Law Rep. 2 H. L. 239.
(2) Law Rep. 8 C. P. 121.
(3) Law Rep. 10 C. P. 379, 380.
(4) Law Rep. 20 Eq. 1, 11.
(5) 30 L. J. (Q.B.) 22. See per Keating, J., in *Quartly* v. *Timmins*, Law Rep. 9 C. P. 416.
(6) Ante, p. 227.

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(5)K 6 Jur NS 1260.

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might and ought to have been taken in that court. That case, therefore, is no authority for the proposition contended for by Mr. Kemp, viz. that we are bound to enforce a judgment of the Mayor's Court which is admitted to have been obtained in a matter over which that court had no jurisdiction. As to the other part of the rule, I think the true answer has been given by my Brother Brett to the case of *Baker* v. *Clark* (1), which was relied on to shew that a writ of prohibition to the Mayor's Court cannot be granted upon the application of the defendant himself. That case really arose in this way. It being suggested that s. 15 of the Mayor's Court of London Procedure Act, 1857, precluded the defendant from objecting to the jurisdiction of the court otherwise than by plea, the applicant was recommended, in order to obviate the supposed difficulty, to renew the motion in the name of a stranger. The Master of the Rolls, in *Jacobs* v. *Brett* (2), in a deliberate judgment, clearly demonstrates that that section relates only to the procedure in the Mayor's Court. I entirely agree with that very learned judge, and so I believe do all the judges with whom I have had an opportunity of speaking on the subject. I therefore come to the conclusion that Mr. Kemp's argument fails upon both grounds, and that the order should be made absolute in its terms.

BRETT, J. I am of the same opinion. In this case a judgment has been obtained against the defendant in the Mayor's Court, London, and has been removed into this Court under 20 & 21 Vict. c. clvii, s. 48, for the purpose of enforcing it. A rule has been obtained to set aside the judgment so removed, and then to prohibit the inferior court from further proceeding to enforce the judgment there, on the ground that it was obtained in a matter over which that court had no jurisdiction. If Mr. Kemp's argument, that s. 48 compels us to give effect to the judgment, be correct, the consequence would be this, that, if an action were brought upon the judgment, want of jurisdiction would afford a defence, but that, by removing the judgment to a superior Court, that consequence is avoided, and the superior Court is bound to enforce a bad judgment. I see nothing in the Act to prevent our dealing with

(1) Law Rep. 8 C. P. 121. (2) Law Rep. 20 Eq. 1, 7.

it here; and then, the judgment here being set aside, there is nothing to prevent us from prohibiting the inferior court from proceeding further to enforce the judgment so improperly obtained there. In the case of *Williams* v. *Bolland* (1), cited by Mr. Kemp, the court below had jurisdiction. There was an irregularity in the proceedings, which might have been set right by motion there. The judgment, being a judgment of a court of competent jurisdiction, and removed into this Court for the mere purpose of obtaining execution, the Court was quite right in declining to interfere. Here, however, the thing complained of is not matter of mere irregularity or of appeal, but of prohibition. As to *Baker* v. *Clark* (2), it was never intended by this Court as a matter of law to decide that the defendant himself could not move. All that was meant was, that, as some argument might be raised as to s. 15 of the Mayor's Court of London Procedure Act, it was better not to raise the question, when all doubt might be obviated by moving in the name of a stranger, as suggested in the judgment in *Cox* v. *Mayor of London*. (3) The decision of this Court in *Worthington* v. *Jeffries* (4) does not seem to me at all to conflict with that of the Master of the Rolls in *Jacobs* v. *Brett*. (5) None of the provisions of the Mayor's Court of London Procedure Act have any effect outside the Mayor's Court.

ARCHIBALD, J. Mr. Kemp's argument would make a judgment obtained without jurisdiction in the Mayor's Court available here without opportunity of questioning it. That would lead to a very undesirable state of things. If this had been a judgment of our own Court, we might examine it. When we examine it, we find that its foundation is a matter over which the Mayor's Court had no jurisdiction. We are bound to set it aside. I think the correct explanation of *Williams* v. *Bolland* (1) has been given by my Brother Brett. As to the other point, I agree with what has been said by my Lord and my Brother Brett. Sect. 15 of the Mayor's Court Act only meant to prohibit the defendant from questioning the jurisdiction of the court otherwise than by plea *in that court*.

(1) Ante, p. 227.
(2) Law Rep. 8 C. P. 121.
(3) Law Rep. 2 H. L. 239.
(4) Law Rep. 10 C. P. 379.
(5) Law Rep. 20 Eq. 1.

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It is perfectly open to the defendant, as to any one else, to call the attention of a superior Court to any excess of jurisdiction claimed by the inferior court.

Order absolute.

Solicitor for plaintiff: *H. Aird.*
Solicitors for defendant: *Evans & Eagles.*

May 10.

[IN THE COURT OF APPEAL.]

WRIGHT, CLERK, *v.* DAVIES, CLERK.

Ecclesiastical Dilapidations—34 & 35 Vict. c. 43—Agreement that neither Party, on an Exchange of Livings, shall pay Dilapidations—Simony.

The plaintiff, incumbent of the rectory of A., and the defendant, the incumbent of the vicarage of B., with the assent of their respective patrons and diocesans, agreed to exchange their respective benefices, without any payment being made for dilapidations on either side:—

Held, by the Common Pleas Division, upon the authority of *Goldham* v. *Edwards* (16 C. B. 437; 17 C. B. 141; 18 C. B. 389), that such an agreement was not necessarily simoniacal before the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), and that it was not so contrary to the policy of that Act as to become illegal and void since.

The plaintiff having sued the defendant for dilapidations, the defendant pleaded the above agreement, the plaintiff replied, on equitable grounds, that the defendant at the time of the agreement represented to the plaintiff that the repairs of B. would be merely nominal, or only equal to those of A., though he "knew or ought to have known" that the former would be greatly in excess of the latter, and that on the faith that such representation was true the plaintiff made the agreement:—

Held, on demurrer, that the replication was bad, there being no suggestion of fraud or that the defendant knew of the inequality at the time of making the agreement.

Affirmed by the Court of Appeal.

THE first count of the declaration stated that the defendant, before the making of the order thereinafter mentioned, was the incumbent of the benefice of Gisburne, in the county of York, in the diocese of Ripon, and, being such incumbent, the defendant vacated such benefice and the same then and thereby became void, and the plaintiff then became and was and is his successor and new incumbent of such benefice, and thence hitherto became and still is the new or present incumbent of such benefice upon and

after the avoidance thereof by the defendant; and the plaintiff sued the defendant for that the defendant, as such late incumbent, became and was and is indebted to the plaintiff as such new incumbent in the debt or sum of 247*l.* 19*s.* 6*d.* under and by virtue of an order of the bishop of the said diocese of Ripon bearing date the 28th of February, 1874, duly made and signed by the said bishop in triplicate in pursuance of the 34th and 35th sections of the Ecclesiastical Dilapidations Act, 1871 (1), in and by which said order the said bishop stated that the repairs of the building of the said benefice for which the defendant, the said late incumbent, was and is liable were those stated in the schedule to that order, and that the cost of such repairs, for which the defendant, as the said late incumbent, was and is liable, amounted to the said sum of 247*l.* 19*s.* 6*d.*: Averment, that all conditions precedent had been performed and all things had been done and had happened and all times elapsed necessary and proper to constitute the sum stated in the order as the cost of the said repairs a debt due from the defendant as the late incumbent to the plaintiff as the new incumbent, and to entitle the plaintiff as such late incumbent to recover from the defendant the sum stated in the said order, pursuant to 36th section of the Act: Breach, that the defendant had not paid the same, or any part thereof.

Second plea, that whilst the defendant was incumbent of the said benefice of Gisburne as in the declaration mentioned, the plaintiff was vicar of the benefice of St. Mary's, in the county of Huntingdon, in the diocese of Ely; that the plaintiff and defendant thereupon, with the assent of their respective patrons and diocesans, agreed to exchange their said respective livings in their then state and condition, and that no payment of any kind on either side should be made for dilapidations, and that the defendant should not be liable to pay the plaintiff for the repairs in the declaration mentioned; that the said exchange was made accordingly, and the defendant on his part had always been ready and willing to carry out and had carried out the said agreement; that the plaintiff became the successor to the defendant as in the declaration mentioned upon the terms that he the plaintiff should bear the costs of the repairs for which the said order was made,

(1) 34 & 35 Vict. c. 43.

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and that the defendant should not be liable to pay the plaintiff therefor, and after the making of the said agreement and after the said exchange the said order was made, and the defendant said that the repairs mentioned in the said order were and are dilapidations within the meaning of the said agreement.

Second replication, on equitable grounds, to the second plea,—That, upon and after the said avoidance and vacating by the plaintiff of the said benefice or living of St. Mary's in the diocese of Ely, the defendant thereupon became and was and is the successor and new incumbent of the said benefice of St. Mary's; that the said bishop of the said diocese of Ely duly made an order similar to that in the first count mentioned, in pursuance of the said Ecclesiastical Dilapidations Act, 1871, in and by which order the said Bishop of Ely stated that the repairs of the buildings of the said benefice of St. Mary's for which the plaintiff, the said late incumbent of St. Mary's, was and is liable were those stated in the schedule to that order, and that the cost of such repairs, for which the plaintiff as the said late incumbent of St. Mary's was and is liable, amounted to the sum of 32*l.* 10*s.*; that, at the time of the making of the alleged agreement and exchange in the second plea mentioned, the defendant represented and stated to the plaintiff that the repairs of the buildings of his the defendant's said benefice of Gisburne were merely nominal or equal or equivalent in amount to the repairs of the plaintiff's said benefice of St. Mary's; that the agreement in the second plea mentioned was made by the plaintiff on the faith and belief that such representation of the defendant was true and correct and not otherwise, whereas in fact and in truth the said repairs of the buildings of the defendant's benefice of Gisburne were not nor are nominal, and were far more than equal or equivalent to and greatly exceeded in amount the repairs of the plaintiff's said benefice of St. Mary's, and amounted to the sum of 247*l.* 19*s.* 6*d.*, as the defendant knew or ought to have known, and such statement and misrepresentation and such alleged agreement was and is an evasion by * and in contravention of the said Act; that the respective patrons and diocesans had not nor had any of them any notice or knowledge of the alleged agreement until long after the making of the said several orders, and that they in no way ratified, approved of,

* Sic.

or confirmed the alleged agreement; that he, the plaintiff, on the faith and bonâ fide belief of such statement and representation being true, and believing the same to be true, and not having any reason to believe otherwise, entered into the alleged agreement in the second plea, and not otherwise; that, by reason of the premises and of the non-payment of the said sum or any part thereof, he had been wholly unable to pay and had not paid, and could not pay, the said sum of 247*l.* 19*s.* 6*d.*, or any part thereof, to the said governors in the said Act mentioned, as in and by the said Act required in that behalf, and as he the plaintiff might and would and ought otherwise to have done; and that the said agreement was and is an agreement in contravention of the statutes in such cases made and provided.

Third replication to the second plea, that the plaintiff was induced to enter into and make, and made, the alleged agreement in the second plea mentioned, by the fraud, covin, and misrepresentation of the defendant.

Demurrer to the second plea, on the ground that it "discloses an agreement in contravention of the Ecclesiastical Dilapidations Act, 1871." Joinder.

Demurrer to the second and third replications to the second plea, respectively, on the ground of departure. Joinder.

Jan. 7. *Baylis, Q.C.* (*Crompton* with him), for the plaintiff. The question turns upon the construction of certain sections of the Ecclesiastical Dilapidations Act, 34 & 35 Vict. c. 43. Sect. 29 provides that, "within three months after the avoidance of any benefice after the commencement of this Act, unless the late incumbent shall under this Act be free from all liability to dilapidations, the bishop shall direct the surveyor, who shall inspect the buildings of such benefice, and report to the bishop what sum, if any, is required to make good the dilapidations to which the late incumbent or his estate is liable, and the late incumbent, his executors or administrators, shall have right of entry at reasonable hours, with his or their surveyor, upon the premises of the vacated benefice until such time as the question of the dilapidations has been finally settled." The surveyor is to send a copy of his report to each party: s. 30. The report is to specify the works needed,

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and what sum will be required to make good the dilapidations: s. 31. The new and the late incumbent respectively may object to the report: ss. 32, 33. The 34th section (under which the order in question was made) enacts that "the bishop shall in uncontested cases, as soon as conveniently may be after the time for the transmission of objections has expired, and in contested cases after consideration of the whole matter, make an order stating the repairs and their cost for which the late incumbent, his executors or administrators, is or are liable." "The sum stated in the order as the cost of the repairs shall be a debt due from the late incumbent, his executors or administrators, to the new incumbent, and shall be recoverable as such at law or in equity:" s. 36: and "the new incumbent shall, as and when he shall recover the said sum or any part thereof, forthwith pay the amount recovered to the governors [of Queen Anne's Bounty]; and if and whenever he shall recover any further part of the said sum he shall in like manner forthwith pay to the governors the further part so recovered." The governors may advance money to the new incumbent on the security of the benefice: s. 38; keeping a "dilapidation account:" s. 39. By s. 40 it is provided that "the new incumbent shall, within six calendar months next after the date of the order (or within such extended period as hereinafter [s. 41] mentioned), pay to the governors, to be carried to the credit of the said account, such sum (if any) as, together with the sums theretofore carried to the credit of the said account, will make up the sum stated in the order as the cost of the repairs." Sect. 42 enacts that "the new incumbent shall cause the repairs specified in the order to be executed within eighteen months after the date of the order, unless, with the consent of the patron and bishop, he shall decide upon re-building the premises in question, in which case the money standing to the credit of his dilapidation account in the books of the governors shall be applied towards the cost of the new building." The plea here is framed upon the model of the seventh plea in *Goldham* v. *Edwards* (1), where it was held to be a good plea, because it did not necessarily shew that the contract was simoniacal. That was an action founded upon the

(1) 16 C. B. 437; 17 C. B. 141; 18 C. B. 389; 24 L. J. (C.P.) 189; 25 L. J. (C.P.) 223. 1 Jur. N.S. 684; 2 L. 493.

common-law duty which attaches as between an outgoing and an incoming incumbent; and for anything that appeared the dilapidations of the premises belonging to the plaintiff's benefice may have been equal in amount to those of the buildings belonging to the exchanged benefice. In *Downes* v. *Craig* (1), though this precise point was not decided, there are dicta of Lord Abinger and of Parke, B., which have an important bearing upon this case.

[LORD COLERIDGE, C.J. You can hardly expect us to hold this plea bad, after the decision of the Exchequer Chamber in *Goldham* v. *Edwards*. (2) It is, however, perfectly competent to you to argue that the statute has altered that state of things.]

No doubt the plea must be assumed to be good at common law. But the replication introduces the element which in the view taken by Lord Abinger and Parke, B., in *Downes v. Craig* (1) would make the contract simoniacal and void. Since the statute, the plea itself is no answer. The statute provides elaborate machinery for settling the claims for all dilapidations as between outgoing and incoming incumbents: its provisions would become a dead letter if they could be evaded by parties agreeing amongst themselves to waive those claims.

[BRETT, J. Do you contend that the agreement for the exchange is simoniacal and void, even though the dilapidations to the buildings of the two benefices are equal?]

Yes. Since the statute, the substantial parties interested are the governors of Queen Anne's Bounty, and not the incumbents. The new incumbent cannot contract himself out of the duty imposed upon him by the statute. The 46th and 47th sections shew the benefit which will result to the new incumbent by the order. (4)

(1) 9 M. & W. 166.

(2) 18 C. B. 389; 25 L. J. (C.P.) 223.

(3) Sect. 46 enacts that "when the repairs shall have been finished, the surveyor, if the same shall be completed to his satisfaction, shall give a certificate of the same having been completed, which certificate shall be in triplicate, and one of the triplicates shall be delivered to the incumbent or the sequestrator, another registered in the registry of the diocese, and the third delivered to the governors, and such certificate shall be conclusive evidence of the due execution of the prescribed works."

And s. 47 enacts that, "If such benefice shall become vacant within five years [from the filing of the said certificate], the incumbent or his representatives shall not be liable to any claim for dilapidations in respect of the buildings specified in the certificate, except for wilful waste."

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The second replication shews that the agreement was simoniacal and void within the statute of Anne. A contract which is opposed to the general policy of the law may be illegal, though there be no express words in the statute declaring it to be so: *Staines* v. *Wainwright* (1); *Watson* v. *Mid-Wales Ry. Co.* (2) [The third replication was withdrawn.]

Gully (*Crump* with him), contrà. *Goldham* v. *Edwards* (3) is conclusive to shew that the agreement set out in the plea is not obnoxious to the charge of simony. The real question is whether there is anything in the statute to render the agreement void. At common law the liability of the outgoing to the incoming incumbent was enforceable only by action upon the case. The statute has, in order to prevent long and expensive references as to dilapidations, provided a more simple mode of ascertaining the amount, which when ascertained is recoverable as a debt at law or in equity. If the old incumbent cannot or does not pay the amount, the new one must do so, under the penalty of a sequestration. There is, however, nothing in the Act to interfere with the rights of the parties as to the exchange of livings; and there is abundant security that the living shall sustain no detriment from such an arrangement. The replication contains nothing to shew that the contract was in the remotest degree tainted with simony.

Baylis, Q.C., was heard in reply.

LORD COLERIDGE, C.J. This is a demurrer to a declaration by an incoming against an outgoing incumbent for dilapidations upon an exchange of benefices. It must be taken upon the pleadings that 247*l.* 19*s.* 6*d.* would be the amount of dilapidations which the incoming tenant would have to pay and which he would have been entitled under the old law to recover from the outgoing tenant upon the exchange. The present action, however, is brought under the state of things created by the Ecclesiastical Dilapidations Act, 1871, 34 & 35 Vict. c. 43. By that Act a convenient machinery is provided for ascertaining and enforcing

(1) 6 Bing. (N.C.) 174.
(2) Law Rep. 2 C. P. 593.
(3) 16 C. B. 437; 17 C. B. 141; 18 C. B. 389; 24 L. J. (C.P.) 189; 25 L. J. (C.P.) 223.

payment of the amount of dilapidations on the avoidance of a benefice. By s. 29, the surveyor is to inspect, and to report to the bishop what sum is required to make good the dilapidations for which the late incumbent or his estate is liable. Subsequent sections provide for notice to the parties, the form of the surveyor's report, and the mode of objecting to it. By s. 34, the bishop is to make an order specifying the repairs to be done and their cost, which sum is to be "a debt due from the late incumbent, his executors, &c., to the new incumbent, and shall be recoverable as such at law or in equity." By the 36th and subsequent sections the money received from the outgoing incumbent, and such further sum as may be required, is to be paid to the governors of Queen Anne's Bounty, to the "Dilapidations Account" of the particular living; and the repairs are to be done by the new incumbent and paid for out of such fund, so far as it will go. The defence here set up by the outgoing incumbent in substance is, that the incoming incumbent has no right to sue him for these dilapidations, because by agreement between them upon the exchange of their respective benefices, with the consent of their respective patrons and diocesans, it was arranged that the respective livings should be exchanged in their then state and condition, and that no payment of any kind on either side should be made for dilapidations. The simple question is whether that is a good plea,—in other words, whether that is an agreement which the law can sanction. Mr. Baylis has very properly admitted that, after the decision of this Court in *Goldham* v. *Edwards* (1), affirmed by the Exchequer Chamber (2), he could not contend that such an agreement would not have been good under the old law. In that case, a plea almost identical in terms with the present was held to be good; for that, although such an arrangement might possibly be simoniacal, the facts disclosed in the plea did not shew that it was necessarily so. The decision of the Exchequer Chamber in that case is a binding authority upon us; and I think we must hold that, but for the recent statute, this would be a good plea. Mr. Baylis, however, further contends that, though the plea might have been a good one under the old law, it is not so now, because, if not strictly simoniacal, the agreement disclosed in it is so manifestly contrary

(1) 16 C. B. 437; 17 C. B. 141; 24 L. J. (C.P.) 189.
(2) 18 C. B. 389; 25 L. J. (C.P.) 223.

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to the spirit of the Act as to make it illegal and void, whether simoniacal or not. I do not say that there might not be a contract framed so entirely to defeat the object of an Act of Parliament that, though not within its express prohibition, yet so as to be impliedly forbidden by it. I must confess that, coming to the consideration of this Act of Parliament for the first time, I was rather disposed to think that, regard being had to the general purpose of it,—the protection of benefices and the securing to the governors of Queen Anne's Bounty a fund out of which the habitations of the clergy might be decently upheld,—it might be that such an agreement as this, which in effect absolves the estate of the outgoing incumbent from a burthen which the law imposes upon it, might be void as being against the policy of the law. But, upon looking carefully at the several provisions of the Act, and especially at s. 40, I am satisfied that this would be an erroneous view of the statute, and that the whole scheme of it may be well carried out without holding this agreement to be contrary to its policy. An important change is made in the form of the remedy for dilapidations: whereas before it was by an action upon the case, now the amount becomes a debt,—an ascertained debt. The new incumbent is not immediately interested in the money recovered: it goes to the fund in the hands of the governors of Queen Anne's Bounty. Sect. 40 is a direct enactment that the whole of the sum mentioned in the bishop's order is to be paid by the new incumbent to the fund in question, whether he shall receive it from the estate of his predecessor or not: and ss. 42 and 43 give the governors the means of enforcing this; and by ss. 60, 61, the living may be sequestered if necessary. The matter must at last turn upon the true construction of s. 40: all the other provisions only tend to strengthen the conclusion to be drawn from the language of that section. However harsh some of these provisions may seem to be, it must be borne in mind that the new incumbent was always liable to put the ecclesiastical buildings in repair, whether he recovered anything from the old incumbent or his estate or not. I see nothing illegal in a bargain like this between the outgoing and the incoming incumbent, provided it be not simoniacal. I think therefore the agreement stated in this plea is not in any way contrary to the policy of the Act. It is not simoniacal: therefore the plea must be held good. Then it

is said that, taking the plea and the replication together, enough appears to shew that the bargain was simoniacal. No charge of corruption or dishonesty is made; nor are any facts stated which necessarily lead to the inference that there was anything fraudulent or inequitable in the transaction. All that the replication says, is, that the amount of the dilapidations of the one benefice was 32*l.* 10*s.*, and that of the other 247*l.* 19*s.* 6*d.*, "as the defendant knew or ought to have known;" carefully avoiding any suggestion of fraud. Is there, then, anything for which a Court of equity would relieve the plaintiff against the performance of this agreement? I am not aware of any case or of any principle of law which says that a mere statement that the one party knew or ought to have known of the disparity in amount of the dilapidations, and that the agreement is an evasion of an Act of Parliament, entitles the other to relief in equity. If there had been any such case or any such principle known to the law, Mr. Baylis would no doubt have produced it before us. I think the plea is good, and the replication bad.

BRETT, J. Before the passing of the Ecclesiastical Dilapidations Act, 1871, upon the avoidance of a benefice by death, resignation, or otherwise,—*Downes* v. *Craig* (1),—it was the duty of the late incumbent to leave the buildings belonging to the benefice free from dilapidation; and a common-law liability was imposed upon him or upon his representatives which might have been enforced against him or them by the incoming incumbent by an action upon the case. According to *Goldham* v. *Edwards* (2), the respective incumbents of two benefices might lawfully, with the consent of the patrons and diocesans, exchange their benefices, mutually agreeing that the dilapidations of the one should be set off against those of the other, provided that it did not appear that the contract was corrupt or simoniacal. By the statute no new duty is imposed upon the avoiding incumbent: his duty and liability remain as before; but new machinery is provided for enforcing them. By s. 29, it is provided that the bishop shall within three months after the avoidance direct the surveyor

(1) 9 M. & W. 166.
(2) 16 C. B. 437; 17 C. B. 141; 18 C. B. 389; 24 L. J. (C.P.) 189; 25 L. J. (C.P.) 223; 1 Jur. (N.S.) 684; 2 L. T. 493.

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to inspect the buildings and report to him the amount necessary to make good the dilapidations. By s. 34 the bishop is to make an order stating the repairs and their cost, for which the late incumbent, his executors, &c., is or are liable. The order being made, the amount of the liability of the late incumbent is ascertained, and, by s. 36, becomes "a debt due from the late incumbent, his executors, &c., to the new incumbent, and shall be recoverable as such at law or in equity." The money when recovered is to be paid over to the governors of Queen Anne's Bounty, with such other sum as may be necessary, and the repairs are to be done by the new incumbent. I see nothing in the statute which has prohibited a party from setting up a defence which was a good defence before. It has been argued that the statute does prohibit such an agreement as that set out in this plea: and the question is whether it does expressly or by implication make such an agreement illegal. It is not pretended that it does so expressly: it remains, therefore, to be seen whether it does so by implication. It is urged that the object of the statute was the protection of livings, and that the living will not be protected unless we hold that an agreement like this is prohibited. But, when the Act is closely examined, as has been well done by my Lord, it will be seen that its objects were, first, to ascertain the amount of dilapidations for which the old incumbent is liable, before any proceedings can be taken against him or his representatives, and secondly, to provide a fund for making good such dilapidations, by requiring the sum necessary for that purpose to be handed over to the governors of Queen Anne's Bounty, whether obtained from the old incumbent or not. Thus the living is amply protected. I find nothing in the Act to make such an agreement as this illegal. In truth the Act does not assume to interfere with the old law. If valid under the old law, the agreement is equally valid now. The plea, therefore, is as good an answer to the present action as it would have been to an action brought before the statute. Then, is the replication an answer to the plea? The defect in the replication is that it does not shew that the inequality in the amount of the respective dilapidations was known to the defendant at the time of the agreement. Whether or not the agreement would have been simoniacal if this had appeared, it is unnecessary to

say. I think this replication is bad. The replication of fraud I am happy to find has been withdrawn: there never was any intention to impute fraud of any kind. Upon the whole, therefore, I am of opinion that the defendant is entitled to judgment.

DENMAN, J. Agreeing entirely in the judgments pronounced by my Lord and my Brother Brett, and in the reasons they have given, I will only add a word. Mr. Baylis's argument amounts to this, that the new incumbent, having a right given to him by the Act for the benefit of the living, could not contract himself out of the Act,—it would be contrary to the policy of the Act. But, when its provisions are carefully looked at, we find that the Act does not do that which Mr. Baylis's argument assumes it to do. It does not alter the old liability of the outgoing incumbent: it merely provides a new mode of enforcing it, which the new incumbent may avail himself of or not, as he pleases. All that is required is, that some how or other the amount of the dilapidations, when ascertained in the mode pointed out, shall be forthcoming, and shall be handed over to the governors of Queen Anne's Bounty, to be dealt with by them in conformity with the directions of the Act.

Judgment for the defendant.

Against the above decision the plaintiff appealed.

May 10. *Baylis, Q.C.*, for the plaintiff. The plea is bad, inasmuch as it sets up an agreement contrary to the policy of the Ecclesiastical Dilapidations Act, 1871. The intention of that Act was, to secure the application of the sum recoverable from the old incumbent for the advantage of the benefice. Such an agreement as this would frustrate that intention. The agreement is also bad as being simoniacal.

[JESSEL, M.R. But, how can you avoid part of the arrangement only? If there was simony, and it avoids anything, it must be the whole exchange. Your right of action is founded on the exchange. Moreover, simony is giving something for spiritual preferment. Here the defendant gives nothing: he gets something in addition to the new living.]

Assuming that such an agreement is good if procured fairly,

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and where the parties have an equal knowledge of the facts, the replication is a good answer.

[JESSEL, M.R. The replication is, if anything, an allegation of fraud on the defendant's part: but you cannot avail yourself of fraud as an answer to an agreement, as long as you enjoy any benefit under the agreement.]

Gully and *Crump*, for the defendant, were not called upon.

JESSEL, M.R. The facts of this case, as stated on the pleadings, appear to be these. There was an exchange of livings between the plaintiff and the defendant; and an arrangement was made that neither of them should claim against the other in respect of dilapidations. It does not appear on the pleadings what the value of the livings was, or that the agreement for the exchange was made in any respect corruptly. I do not mean to say that it would be necessary to use "corruptly," or any particular form of words, in order to raise a case of simony; but there is nothing here alleged which amounts to corruption: there is nothing to shew any corrupt motive or inducement which led to the exchange. That being so, the plaintiff finds that he has to pay 247*l.* 19*s.* 6*d.* for dilapidations, whereas the defendant has to pay only 32*l.* 10*s.*; and the plaintiff seeks to recover from the defendant the sum he has paid, on the ground that the bargain which he made to release the defendant was illegal, as being against the policy of the Ecclesiastical Dilapidations Act. He says: "I was a bare trustee of the action for the governors of Queen Anne's Bounty, or for the benefit of the living: I could not release you from the action." The second point is, that the agreement for the exchange of the livings was simoniacal, and that the plaintiff was entitled to avoid so much of it as was illegal, without avoiding the whole.

With regard to the first point, it is only necessary to consider the true meaning of the Act. Before the Act, the action for dilapidations by the new incumbent against the old was an action of damages; and it might have happened, that, though the new incumbent recovered a large amount for dilapidations, not being bound in any way to apply it for the benefit of the living, he might put it in his own pocket. The Act alters the law in this respect: now, there must be a survey made, and then the Act

provides how the repairs found to be necessary are to be done. The substance of its provisions is this:—The new incumbent is to have an action of debt for the amount which the surveyor has reported. When he has recovered the amount, he is not to be allowed to put it in his pocket, but he must pay it over to the governors of Queen Anne's Bounty. Whether he gets anything it is not from the old incumbent, he is bound within six months to pay to the governors the amount of the cost of the repairs, and he is liable to complete the repairs; and, as the repairs are executed, the moneys standing in the books of the governors of Queen Anne's Bounty to the credit of the dilapidations account are to be paid out to the person certified by the surveyor to be entitled to them: but, if any further moneys are required for the completion of the repairs, the new incumbent is liable to pay them. If the incumbent fails to pay to the governors of Queen Anne's Bounty the amount of the repairs, the bishop may be applied to to raise the necessary amount by the sequestration of the benefice. The substance of the whole is, that the remedy against the old incumbent is made more simple, and convenient, and the application of the money recovered from him for the benefit of the benefice is secured: but in other respects the old law is unaltered. The Act does not make the new incumbent a trustee of the action against the old incumbent, but a trustee of the proceeds of such an action. The two things are entirely different. If the new incumbent were a trustee of the action, he could not compromise it, or make terms, or otherwise deal with it to the prejudice of the cestui que trust. And the old incumbent, although the action were so compromised, would remain liable if he had notice of the breach of trust. Looking at the language of the Act, it does not seem to me that there is anything which can be construed as making the new incumbent a trustee of the action. The 36th section says that the amount of the dilapidations shall be a debt; and s. 37 provides for payment of the proceeds of the action to the governors of Queen Anne's Bounty. And, though it would have been clearer if the same words, viz. "if" and "whenever" had been used in one part of the 37th section as in the other, still I think that the words "as" and "when" clearly are intended to mean the same thing; and the intention is that the

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incumbent shall be, not trustee of the action, but of the proceeds if and when recovered. If he gets anything, he is not to put it into his pocket; but the Act does not say he shall sue. It is unnecessary to read the other sections; but it will be found, when they are considered, that there is nothing to render it obligatory on the new incumbent to sue.

With regard to the second point, it does not appear to me on these pleadings that this contract is alleged to be simoniacal. In order to make the contract simoniacal, there must be a statement amounting to an allegation that money or money's worth was given as an inducement for the exchange. There is nothing to shew here that this agreement as to dilapidations in any way acted as an inducement to the exchange. As far as appears, it was entirely subsidiary to an exchange, and did not act as a motive to it at all. Moreover, I do not see how the transaction can in any way be put as simony on the defendant's part; the defendant was getting something in addition, not giving something for the living he took in exchange. It was argued that the statement that the defendant ought to have known that the dilapidations were of much greater amount in one case than the other, shews that there was fraud or corruption. I am at a loss to know what is meant by that allegation. It suggests some duty on the defendant's part, but does not state what it was. Such an allegation is altogether too vague to found a charge of simony upon. For these reasons I think the judgment should be affirmed.

KELLY, C.B. I am of the same opinion. The case of *Goldham* v. *Edwards* (1) shews that such an agreement as this was not illegal before the Act. It is contended that the Act has made the law otherwise. I do not agree with that contention. The Act gives a more convenient remedy to the new incumbent, and provides that, if he does recover in respect of the dilapidations, he shall apply the sum recovered in a certain way. There are also provisions as to how the repairs shall be effected, whether he recover anything from the old incumbent or not. But there is nothing to compel the new incumbent to bring an action, so as to make an agreement not to sue contrary to the policy of the Act.

(1) 16 C. B. 437; 17 C. B. 141; 18 C. B. 389; 24 L. J. (C.P.) 189; 25 L. J. (C.P.) 223; 1 Jur. N.S. 654; 2 id. 493.

The new incumbent may bring an action for the amount of the dilapidations as certified by the surveyor; and, if he recovers it, he must pay it over to the governors of Queen Anne's Bounty: and then, if he does the repairs, the money is to be returned to him. If he fails to do the repairs, the governors of Queen Anne's Bounty may do them themselves. If the new incumbent does not recover from the old, still he must do the repairs; and, if he does, all that the law requires is secured; but, if he does not, the governors of Queen Anne's Bounty may do them, and there may be a sequestration to provide for the expenses so incurred. I agree with the Master of the Rolls in the distinction he draws between making the new incumbent a trustee of the action and making him a trustee of the proceeds of the action. If the new incumbent were a trustee of the action, he would be absolutely obliged to sue, and could not make any arrangement with regard to the action without being in danger of committing a breach of trust. I do not think that the Act was intended to produce any such result.

With regard to the second point, I think the plaintiff must fail in that too. If the agreement was simoniacal or fraudulent, the simony or fraud should have been distinctly averred. I do not think there is any sufficient averment for that purpose. We cannot on such an obscure statement as that the defendant "ought to have known" infer fraud or simony. I think that the defendant for these reasons is entitled to judgment, and the judgment below must be affirmed.

MELLISH, L.J., and POLLOCK, B., concurred.

Judgment affirmed.

Solicitors for plaintiff: *Norris, Allens, & Carter.*

Solicitors for defendant: *Shaw & Tremellin, for Hall & Baldwin, Clitheroe.*

1876 THE STEAMSHIP COMPANY "NORDEN" *v.* DEMPSEY.

May 20.

Shipping—Charterparty, Construction of—Arrival of Ship—Commencement of Lay-Days—Local Custom—Foreigner.

Timber was consigned, under a charterparty made at Riga, to the Canada Dock in the port of Liverpool, a given number of days being allowed for unloading there:—

Held, that, by the general law, the lay-days commenced from the time the ship arrived in the dock; but that it was competent to the consignee to shew, notwithstanding the plaintiff was a foreigner, that there was a custom in the port of Liverpool, that, in the case of timber ships, the lay-days commenced only from the mooring of the vessel at the quay where by the regulations of the dock she was alone allowed to discharge.

Action for demurrage upon a charterparty and bills of lading made at Riga, in the following terms:—

It is this day mutually agreed between the undersigned F. H. Holm, merchant of this town, on the one part, and C. Michelsen, master of the steamship *Pamona*, on the other,—That the said ship, being tight, staunch, and every way fitted for the voyage, and being also provided with the necessary ship's documents, shall receive and load from the merchant a full and complete cargo and deck-cargo, not exceeding what she can reasonably stow and carry, consisting of square half fir sleepers, and, being so loaded, shall with all convenient speed proceed from Mühlgraben to Liverpool, or so near thereunto as she may safely get, to deliver there the said cargo always afloat, according to the tenor of the bills of lading. After due delivery of the same in good order and well conditioned (all dangers and accidents of the seas and rivers, &c., excepted), the receivers shall pay to the captain or to his order for freight for each load of 50 cubic feet, customs' calliper measure, square half sleepers, 17*s.* 6*d.* British sterling; deck-cargo to pay full freight; captain to receive 5*l.* sterling in gratuity; all in sterling money of Great Britain; one half in cash, and remainder in approved bills on London at three months' date, or less bank discount at captain's option, without any delay or deduction whatsoever. The cargo is to be loaded and discharged together in ten working days, or for every day longer detained the captain to receive demurrage at the rate of 40*l.* sterling per day; and to be delivered here alongside of the vessel, and at port of delivery to be taken from alongside free of expense to the ship.

Steamer to be free of address at port of discharge, but to be cleared at the custom house, Riga, by P. Bornholdt, on usual terms. Sufficient cash for ship's disbursements to be advanced on account of freight, on usual terms. The ship is expected discharged at Surnimünde on the 25th of August instant. A commission of 2 per cent. on amount of freight is due by the ship on signature of this agreement to P. Bornholdt & Co. And, for the due performance, &c.

Dated at Riga, this 12/24th day of August, 1875.

In the margin was the following memorandum :—

Discharging dock to be ordered on arrival of steamer at Liverpool. Steamer to clear at Liverpool by R. Heyn, jun., paying usual reporting fee only.

The sleepers were shipped under two bills of lading. The first was as follows :—

Shipped in good order and well conditioned by F. H. Holm, in and upon the good ship called the *Pamona*, S.S., whereof is master for the present voyage C. Michelsen, and now riding at anchor in the river of Riga, and bound for Liverpool to such dock as ordered on arrival, 8125 red wood sleepers of 5 × 10 $8\frac{11}{12}$ feet long, being marked and numbered as in the margin, and are to be delivered in like good order and well conditioned at the aforesaid port of destination (the act of God, &c., excepted,) unto order or assigns, he or they paying freight for the said goods, and all other conditions as per charterparty, with primage and average accustomed. Dated in Riga the 18/30 August, 1875.

In the margin were these words, "Two days expended in loading this parcel." The second bill of lading, dated "Riga, the 21 August, 2 September, 1875," was in the like terms, but for 12,801 sleepers; and in the margin were these words,—"Three days expended in loading this parcel. For discharging the whole cargo at Liverpool are left five days."

The cause was tried before Lush, J., at the last winter assizes at Liverpool. The facts were as follows:—The plaintiffs, shipowners at Copenhagen, by the instrument above set out chartered the *Pamona* to carry a cargo of railway sleepers from Riga to Liverpool. The sleepers consisted of two parcels, one of which (consisting of 12,801 sleepers) was consigned direct to the defendant, a timber-merchant at Liverpool, he being also assignee of the bill of lading of the other parcel, consisting of 8125 sleepers. The *Pamona* left Riga on the 2nd of September, arrived in the Mersey on Sunday, the 12th, and got into the Canada Dock (one of the two docks in the port of Liverpool where timber-ships are usually unladen), to which she was ordered on arrival, on the 13th, but, by reason of the crowded state of the dock, she did not get a berth at the quay where the unloading was by the regulations of the dock to take place until the 17th; and she commenced unloading on the 18th, and finished on the 23rd.

The plaintiffs claimed demurrage from the expiration of five days after the *Pamona* got into the Canada Dock. The defendant, on the other hand, sought to shew that there was a custom in the port of Liverpool that in the case of timber-ships the lay-days

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commenced only from the mooring of the vessel at the quay where she was alone allowed to discharge, and not from the time of her entering the dock. Thus, according to the plaintiffs' contention, the ship should have been discharged by Saturday, the 18th, instead of the 23rd.

The following question was put by the defendant's counsel to one of his witnesses,—"Is there any usage in the timber-trade at Liverpool as to when the lay-days commence?" This was objected to by the plaintiffs' counsel, and the objection was allowed. The question was repeated in a slightly varied form, and again objected to and rejected. It was finally put thus,—"Is there any custom in the port of Liverpool, with regard to ships in the timber-trade, as to when they are deemed to have arrived at their usual place of discharge?" This also was objected to, and was rejected by the learned judge, on the ground that the alleged custom was too limited, being confined to a particular trade and to vessels bringing a particular description of cargo.

A verdict having been found for the plaintiff,

Jan. 13. *Herschell, Q.C.*, obtained an order nisi for a new trial on the ground of improper rejection of the evidence tendered as to the alleged custom, or (pursuant to leave reserved) to reduce the damages.

May 5, 8. *Cohen, Q.C.*, and *Edwards, Q.C.*, shewed cause. The conditions of the charterparty being incorporated in the bills of lading, the plaintiffs were entitled to demurrage from the expiration of the lay-days, which commenced on the arrival of the ship in the Canada Dock, the voyage being then completed: *Randall* v. *Lynch* (1); *Brown* v. *Johnson* (2); *Kell* v. *Anderson* (3); *Tapscott* v. *Balfour* (4); 1 Parsons on Shipping, p. 313. The defendant sought to prove a local custom by which, it was said, the lay-days commenced, not from the arrival of the ship in the dock, but from the time of her being moored at the quay appropriated by the regulations of the dock for the unloading of such a cargo. This evidence was objected to upon several grounds. In the first

(1) 2 Camp. 352; 12 East, 179.
(2) 10 M. & W. 331.
(3) 10 M. & W. 498.
(4) Law Rep. 8 C. P. 46.

place, because it was an attempt to contradict or vary the terms of the contract which the parties had entered into. In the next place, this being a foreign charterparty, and the ship-owners a foreigner company, they could not be bound by a local custom of which they could not be assumed to be cognisant: *Hathesing* v. *Laing* (1); *Kirchner* v. *Venus*. (2) Further, the alleged custom has reference, not to the port of Liverpool generally, but to a particular part of the port, and to a particular trade. The only ground upon which evidence of custom is admissible is, that the parties must be taken to have known and to have intended to contract with reference to it: per Blackburn, J., in *Robinson* v. *Mollett* (3): and see 1 Duer on Insurance, p. 258, where it is said, "It is to be collected from the decisions that in these cases a usage that can alone be allowed to control the interpretation of the policy, or vary the legal rights of the parties, must be general, uniform, notorious, reasonable, and consistent with the terms of the policy, and to a certain extent with the rules of law."

May 9. *Herschell, Q.C.*, and *T. H. James*, in support of the order. The question in its last form was clearly admissible: its tendency was not to contradict or to vary the terms of the charterparty. It was the duty of the ship-owners to bring the ship to the dock to which she was ordered in the port of Liverpool. It was open to the defendant to shew that by the custom of the port, Liverpool does not mean the port of Liverpool generally, or a particular dock only, but a particular part of the dock assigned to ships in a given trade. In *Kell* v. *Anderson* (4), the charterparty was for a voyage from Newcastle to London; and Lord Abinger said (5): "The days of demurrage must be counted from the time of the arrival of the vessel at *the place of discharge according to the usage of the port*." Parke, B., goes further, and says: "It appears to me that the question in this case is one of fact, viz. at what time the vessel arrived at her place of discharge according to the usage of the port of London *for such vessels*." That case is a strong authority for the defendant. This point was not raised in *Tapscott* v. *Balfour*. (6)

(1) Law Rep. 17 Eq. 92.
(2) 12 Moo. P. C. 361, 399.
(3) Law Rep. 7 C. P. 84, 103.
(4) 10 M. & W. 498.
(5) 10 M. & W. at p. 502.
(6) Law Rep. 8 C. P. 46.

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The circumstance of the charterparty being made abroad, or of one of the parties to it being a foreigner, makes no difference.

Cur. adv. vult.

May 20. LORD COLERIDGE, C.J. This was a motion for a new trial, on the ground of improper rejection of evidence tendered on the part of the defendant at the trial. The question arose thus:—The ship *Pamona* was chartered at Riga for the conveyance of a cargo of railway sleepers to Liverpool, consigned to the defendant. The charterparty contained (amongst others) this stipulation,—"The cargo is to be loaded and discharged together in ten working days, or for every day longer detained the captain to receive demurrage at the rate of 40*l.* sterling per day." In the margin of the charterparty were these words,—"Discharging dock to be ordered on arrival of steamer at Liverpool." The *Pamona* arrived in the Mersey on Sunday, the 12th of September, 1875, and was ordered to the Canada Dock, that being one of the docks where timber-ships are usually unladen. She got into the dock on the 13th, but, by reason of its crowded state, she did not get a berth at the quay where the unloading was to take place until the 17th. She commenced unloading on the 18th, and finished on the 23rd. By memoranda on the two bills of lading, it appeared that five of the ten lay-days had been expended in loading the sleepers at Riga, and consequently there remained only five days for unloading at Liverpool. The question was, when did those days commence; whether from the ship's arrival in the Canada Dock, or from her being moored at the quay-berth at which alone she could discharge her cargo,—in other words, at what time could it be said that the ship under the terms of this charterparty arrived at Liverpool.

Now, it is plain upon principle, and upon authority also, if authority were wanted, that, where the lay-days are to commence running "on arrival" at the ship's port of discharge, evidence may be given to shew what is commonly understood to be the port. Some ports are of large area, and by custom "arrival" is understood to mean arriving at a particular spot in the port. That has been held as to the ports of London, Hull, Antwerp, and many others. The port of Liverpool, as we all know, is of many

miles extent, with a series of docks for different classes of ships and trades. It cannot be denied that, if any question arose upon it, it would be perfectly legitimate to receive evidence to shew that arrival "in the port of Liverpool" did not mean arriving at the mouth of the Mersey. Here, the vessel was shewn to have arrived at the Canada Dock on a certain day. It was sought to carry the doctrine of expanding documents by parol evidence further, and to shew that, in the case of a timber-ship, those words were not satisfied by arrival in the dock, but that the ship must have reached an unloading berth at the quay. If that were so, the verdict would be wrong, and the defendant would not be liable. But, if arrival in the dock itself be enough, under the terms of this charterparty, the plaintiff is entitled to retain his verdict. At the trial, the defendant's counsel proposed to put certain questions for the purpose of shewing that, according to the custom of the port of Liverpool, a vessel arriving with a timber cargo was not to be considered as having arrived at her place of discharge until she had got a berth and quay space to unload in. The question first put was this,—"Is there any usage in the timber-trade at Liverpool as to when the lay-days commence?" That was objected to, and rejected by the learned judge, and the rejection was acquiesced in. The question was repeated in a modified form and again rejected. It was finally put thus,—"Is there any custom in the port of Liverpool, with regard to ships in the timber-trade, as to when they are deemed to have arrived at their usual place of discharge?" That question was carefully considered, but the learned judge rejected it, on the ground that the alleged custom was too limited, being confined to a particular trade and to vessels bringing a particular description of cargo. I am of opinion that the question in that shape and at that time ought to have been allowed to be put, and that its rejection is ground for a new trial. Principle and authority have alike decided that, where the question is what particular part of an extensive port a vessel must have reached before she can be said to have arrived at her destination, evidence may be given as to the usage of the port in that respect. Such evidence has been allowed by judges, and the propriety of receiving it has upon many occasions

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been recognized by the Courts, upon the ground that it is not offered for the purpose of contradicting but merely to explain the contract. If by the usage of the port arrival means coming to a particular spot in the port, evidence has always been allowed to shew that. The question in substance was, what, according to the custom of Liverpool, is the place of arrival of a timber-ship coming to that port? The contract must be taken to have been made with reference to the usage of the port. This is but going another step in the same direction. We have been pressed with the authority of cases in which it has been held (or assumed), and rightly, in the absence of such evidence as this, that arrival in port, as a general rule, means arrival in the docks, if docks there are. *Brown* v. *Johnson* (1) and *Kell* v. *Anderson* (2) were cited for that purpose. Those cases are good authority for that proposition: but they are no authority against the proposition which the defendant contends for here. There is no case to be found in which evidence of a usage such as this has been rejected; and I see no principle for its rejection. Perhaps the nearest approach to an authority is the dictum of Lord Ellenborough in *Randall* v. *Lynch* (3): but the circumstances of that case were totally different: the agreement of the parties fixed the period for the commencement of the lay-days, viz. the day the ship was reported at the Custom House. Without saying what would have been the result had the question been allowed, it appears to me that the case was stopped too short. I think there should be a new trial.

BRETT, J. This is an action against the consignee of a cargo of sleepers; the defendant being the holder of a bill of lading which described the vessel to be "bound for Liverpool to such dock as ordered on arrival," and the goods to be deliverable "at the aforesaid port of destination unto order or assigns, he or they paying freight for the said goods and all other conditions as per charterparty." The charterparty was made at Riga. The ship was to proceed from Mühlgraben to Liverpool, or so near thereto as she

(1) 10 M. & W. 331. (2) 10 M. & W. 498.
(3) 2 Camp. 352; 12 East, 179.

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might safely get, to deliver there the cargo always afloat according to the tenor of the bills of lading. The charterparty contained the following clause:—"The cargo is to be loaded and discharged together in ten working days, or for every day longer detained the captain is to receive demurrage at the rate of 40*l.* sterling per day; and to be delivered here alongside of the vessel, and at port of delivery to be taken from alongside, free of expense to the ship." In the margin of the charterparty was the following memorandum, —"Discharging dock to be ordered on arrival of steamer at Liverpool." The ship arrived at Liverpool on the 12th of September, 1875. There are two docks in the port of Liverpool in which timber ships are unladen, viz. the Canada Dock, and the Brunswick Dock. The vessel in question was ordered to the former of these docks, and she arrived there on the 13th; but she could not for some days obtain a quay berth. It must be taken that a cargo of this description is not allowed to be unloaded in the Canada Dock except at a quay berth. The question was, whether the lay-days were to be counted from the arrival of the ship in the Canada Dock or only from the time of her getting to a berth alongside the quay. The defendant's counsel proposed to ask this question,—"Is there any custom in the port of Liverpool, with regard to ships in the timber-trade, as to when they are deemed to have arrived at their usual place of discharge?" This was for the purpose of obtaining information,—to shew that timber-ships in the Canada Dock are not allowed to commence unloading until they get a quay berth, and that by the usage of the port the lay-days reckon only from that time. The question was objected to, and was disallowed. Upon shewing cause against the order for a new trial upon the ground that the question was improperly disallowed, it was argued by Mr. Cohen that the question was inadmissible, for several reasons. In the first place he contended that, upon the true construction of this charterparty, the tendency of the proposed question was to contradict the contract, for that, by reason of the marginal entry, the final destination of the ship was a dock to be named, and therefore the place of arrival was the Canada Dock, the dock to which the ship was ordered on reaching the Mersey; and that to allow a question as to a custom of the port for inter-

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posing a particular part of that dock as the place of arrival, would of necessity contradict the words of the charterparty. He then argued that, assuming the question to be admissible and proper if the charterparty had been a Liverpool charterparty, it could not be so in this case because the charterparty was made at Riga. He further argued that, even though an Englishman might be bound by such a custom in the case of a charterparty made abroad, evidence of the custom could not be received where one of the parties to the contract was a foreigner. He further argued that the evidence was inadmissible because it professed to set up a custom of the port of Liverpool as to unloading, not as applicable to the whole port or to all trades, but as applicable to a particular part of the port and to a particular trade only.

As to the first point, whether the proposed question would add to or vary the terms of the charterparty, if that was the effect of it I think it was inadmissible. This charterparty was made at Riga. To attempt to vary it by shewing a custom of the port of Liverpool, evidence of which would be admissible only upon the supposition that it was known to both parties to the contract, could not be allowed. I do not accede to the proposition that there is any distinction in this respect where one of the parties to the contract is a foreigner. But I do not think the proposed question has the effect of varying the terms of this charterparty. The contract is, to carry the cargo to Liverpool, a certain number of days being allowed for loading the ship at the port of loading and for unloading her at the place of discharge. Here, Liverpool is the place of discharge. The question therefore is, what is the meaning of "Liverpool?" It is not contended that the vessel arrived at Liverpool the moment she entered the Mersey, but only when she entered a Liverpool dock,—when she had arrived at a place where according to the custom of the port she was considered as an arrived ship. It is then only that the lay-days are to commence. If when she has so arrived she cannot, either by reason of the crowded state of the dock or of the regulations of the dock, commence unloading at once, this will not affect the rights of the ship-owner if she be an arrived ship. If she be an arrived ship when she gets into the Canada Dock, the rights of the owner upon

a contract made at Riga cannot be affected by any regulations of the dock authorities at Liverpool as to the time or mode of unloading. That is settled by *Brown* v. *Johnson* (1) and *Kell* v. *Anderson*. (2) *Randall* v. *Lynch* (3) is no authority to the contrary of what we are now deciding: and I think *Brereton* v. *Chapman* (4) is an authority in support of it. Practically, the very question now objected to was asked there. I think the question was admissible because it was a question tending to solve the fundamental question, when was the ship an arrived ship?

LORD COLERIDGE, C.J. My Brother Lindley desires me to say that he concurs in this judgment.

Order absolute for a new trial.

Solicitors for plaintiffs: *Sharp, Parker, & Co., for William Tyndal, Liverpool.*

Solicitors for defendant: *Field, Roscoe, Osbaldeston, & Co., for Bateson & Co., Liverpool.*

(1) 10 M. & W. 331.
(2) 10 M. & W. 498.
(3) 2 Camp. 352; 12 East, 179.
(4) 7 Bing. 559.

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May 30.

[IN THE COURT OF APPEAL.]

PORTAL *v.* EMMENS.

Railway Company—Sci. fa.—Shareholder—Companies Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 16), *ss.* 3, 8, 36.

A railway Act enacted that certain named persons, of whom the defendant was one, and "all other persons and corporations who have already subscribed to, or shall hereafter become proprietors in the undertaking, shall be and are hereby united into a company for the purpose of making and maintaining the railway," &c. By the Act, the capital of the company was to be 600,000*l.*, divided into 10*l.* shares, and the qualification of a director was to be the possession in his own right of not less than thirty shares. The defendant and the other named persons and two persons to be nominated by them were to be the first directors of the company, and were to continue in office until the first ordinary meeting of the company. The Act further enacted that a certain agreement between the plaintiff and the promoters of the company, which was set out in the schedule to the Act, should be confirmed, and should bind the company. By this agreement a sum of 315*l.* became payable to the plaintiff by the company at a certain date. For this sum the plaintiff afterwards recovered judgment against the company.

No ordinary meeting of the company ever was held, nor any meeting of directors, nor any general meeting of shareholders. No register of shareholders ever was made, nor were any shares ever allotted.

The Companies Clauses Consolidation Act enacts, in s. 3, that the word "shareholder" shall mean "shareholder, proprietor, or member of the company"; and, in s. 8, that "every person who shall have subscribed the prescribed sum or upwards to the capital of the company, or shall have otherwise become entitled to a share in the company, and whose name shall have been entered on the register of shareholders hereinafter mentioned, shall be deemed a shareholder of the company":—

Held (affirming the decision of the Court below), that the defendant and the other persons named as directors by the Act were each shareholders to the extent of thirty shares, notwithstanding that no register of shareholders had ever been created, and that the defendant was liable to be proceeded against by scire facias as a shareholder upon the judgment obtained by the plaintiff.

APPEAL from a decision of the Common Pleas Division.

The facts and the material sections of the special Act are set forth in the report of the case in the Court below. (1)

R. S. Wright, for the defendant. The defendant never was a shareholder in this company and is not liable to a sci. fa. No shares

(1) Ante, p. 201.

ever were created, nor was anything ever done under the special Act. The defendant and the other directors nominated by the Act may be members of the company, but they are not thereby created shareholders. In respect of what number of shares can they be said to be shareholders? It is contended that the provison as to the qualification of directors being thirty shares cannot apply to the directors nominated by the Act.

Secondly, it may possibly be that what has been done amounts to a contract by the defendant and the other nominated directors to take shares; but no shares ever vested in them, and they never became shareholders, because no specific shares ever were created. The cases as to contributories do not apply.

Thirdly, even if the defendant was a shareholder in any sense, he was not one within the meaning of the 36th section of the Companies Clauses Consolidation Act, the section by which the execution is given against shareholders. There never was a register of shareholders of any sort in existence, nor were any specific shares ever created.

[He cited *Forbes' Case* (1); *Kincaid's Case* (2); *Thames Tunnel Co.*. v. *Sheldon* (3); *Wolverhampton New Waterworks Co.* v. *Hawkesford* (4); *Brown's Case* (5); *Ness* v. *Angas* (6); *Yelland's Case* (7); *Forbes' Case* (8); *Bristol Canal Co.* v. *Amos* (9); *Burke* v. *Lechmere* (10); *Irish Peat Co.* v. *Phillips* (11); *Moss* v. *Steam Gondola Co.* (12)]

W. G. Harrison, for the plaintiff. The defendant is a member of the company by the express words of the special Act; and, if so, must be a shareholder. There can be no other corporators but the shareholders in the company. Then, being a director, and a director's qualification being thirty shares, he is a holder of thirty shares.

(1) Law Rep. 19 Eq. 353.
(2) Law Rep. 11 Eq. 192.
(3) 6 B. & C. 341.
(4) 6 C. B. (N.S.) 336; 28 L. J. 242; 7 C. B. (N.S.) 795; 11 C. B. (N.S.) 456; 29 L. J. (C.P.) 121; 31 L. J. (C.P.) 184.
(5) Law Rep. 9 Ch. 105.
(6) 3 Ex. 805; 18 L. J. (Ex.) 470.
(7) 5 De G. & S. 395; 21 L. J. (Ch.) 852.
(8) Law Rep. 8 Ch. 768.
(9) 1 M. & S. 569.
(10) Law Rep. 6 Q. B. 297.
(11) 1 B. & S. 598; 30 L. J. (Q.B.) 363.
(12) 17 C. B. 180.

(4) 5 C. B. (N.S.) 736; 6 L. J. 632; 8 L. J. 844

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[COCKBURN. C.J. My only difficulty is this: he may no doubt be a director if he acts as such, and the company ever comes into actual existence and starts working; but here the company never came into operation. The defendant never acted, and nothing was ever done under the Act.]

But by the terms of the agreement with the plaintiff incorporated in the Act, the company had incurred an obligation, and, so far as was necessary to satisfy this obligation, it was incumbent on the members to act, and it did not lie in their mouths to say the company never came into existence.

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COCKBURN, C.J. I am of opinion that the decision of the Common Pleas Division must be affirmed. The ground on which I base my decision is this: the defendant was one of the persons at whose instance the special Act was obtained; therefore he is a a party to the engagement mentioned in the schedule to the Act between the plaintiff and the company, and is bound by that engagement. By the Act the defendant and two other gentlemen got themselves constituted directors of the company; so far as the general public are concerned they might not be bound to act in the exercise of their functions as directors; but so far as the plaintiff is concerned, he being a person with whom there was a binding agreement for good consideration to which they were parties, they incurred an obligation to exercise their powers as far as was necessary for the purpose of carrying out the bargain. Under these circumstances I think that they cannot be heard to say that they are not directors and have not all powers necessary to the carrying out of the agreement with the plaintiff. If they are directors it seems to me to follow that they are liable to a sci. fa. as shareholders by the terms of the special Act. Our judgment must, therefore, be for the plaintiff.

JESSEL, M.R. I concur. I agree with the decision of the Court below upon the main points that have been discussed. The first question is, as to what is the meaning of the term "shareholder" in the 36th section of the Companies Clauses Consolidation Act. It seems to me that the 3rd section of that Act governs the 36th, and, consequently, that "shareholder" includes

"proprietor" or "member." Can it be denied that under the special Act the defendant is a member of the company? By the 4th section the defendant and certain others are made a body corporate under the name of the Didcot, Newbury, and Southampton Junction Railway Company. He must therefore be a member of the company, for he is one of the corporators. Apart from the 3rd section of the Companies Clauses Consolidation Act how can the defendant be a corporator unless he is a shareholder? The only possible members or corporators of a company are its shareholders. It is therefore clear on the terms of the special Act that the defendant must be considered as holding at least one share. But did he hold more? I think that the Act makes him the holder of the number of shares specified in s. 16 as the qualification of a director. It provides that he shall be a director, and continue so until the first ordinary meeting. He is therefore a director from the moment of the passing of the Act. The 16th section provides that the qualification of a director shall be the possession of thirty shares. The defendant petitioned for the passing of the Act, and accepted office on those terms, and agreed that he should be qualified in that way. I think, therefore, that he is a shareholder to the extent of thirty shares. But it is suggested that the 18th section of the special Act shews that the directors named in the Act need not necessarily possess thirty shares, and that the 16th section does not apply to them. I think the answer to that is plain. The 85th and 86th sections of the Companies Clauses Consolidation Act provide that no one shall be capable of being a director unless he holds the prescribed number of shares, and if he ceases to hold that number of shares he shall cease to be a director; but these provisions apply only to elected directors, and not to directors named in the special Act. If so, it might be that a director named in the special Act might cease to be qualified before the day of re-election, and it may very well have been thought that the provisions as to qualification for being elected might not apply to him, and, consequently, that it was a fair precaution to say that he should not be re-elected unless qualified. But no implication arises from such a provision that the provisions of s. 16 do not apply to the named directors.

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The next point that was urged was the non-existence of a register. It is clear that there cannot be a register in the strictest sense of the term until the book is sealed at the first ordinary meeting. But it is also clear from the Act that there must be shareholders before that, for the first ordinary meeting is to be a meeting of shareholders. The company may have to incur obligations before the meeting. For instance, they may have to give notice to take lands, and many other things might be mentioned which involve liability. It never could be intended that the whole action of the company should be paralysed during this period, especially when it is taken into consideration that the time for the exercise of their powers to take land is limited. There is nothing in the Companies Clauses Consolidation Act to lead to the conclusion that the existence of a register is necessary in order that there may be shareholders against whom a sci. fa. may issue. The only remaining point was that the directors might elect to abandon their powers under the Act. But it seems to me that they are in the same position as if the contract had been entered into with the plaintiff the day after the Act passed. They could not abandon the powers of the Act and break the contract in the case of a person with whom a contract had been made after the passing of the Act, and so in like manner they cannot abandon the Act in this case. For these reasons I think the defendant is liable.

MELLISH, J. I am of the same opinion. By the terms of the special Act, and the agreement incorporated into it, the plaintiff, if the Act passed, was to become a creditor of the company for a certain amount. The question is, whether the Act has provided any machinery by which this contract can be enforced. If the argument for the defendant is right, there is no possible mode of enforcing it. According to that argument, the very persons who obtained the Act and entered into the engagement contained in it can, by omitting to exercise their functions and perform their duties as directors, prevent the performance of the contract. Are we compelled to come to this conclusion? The question is, whether the defendant was made a shareholder, and, if so, for how many shares. That he became a member of the company is clear.

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The 4th section says that he and several others shall be united into a company. The 6th section provides that the capital of the company shall be 600,000*l.*, in 60,000 shares of 10*l.* each. It is clear, therefore, that every member of the company must hold one or more shares of 10*l.* How many, then, does the defendant hold? The 4th section treats him as having subscribed to the undertaking, and there is no doubt some awkwardness from the continuation in use of a mode of expression which originated when there was an actual subscription contract now that it is not usual to have one. But subscribing such a contract is not the only way of subscribing. Any one who agreed in writing to take shares was a subscriber. Here we find that the plaintiff petitioned Parliament to pass the Act, and that petition is the only document that could amount to a subscription by him. He petitioned Parliament, however, to pass the Act by which he was to be constituted a director, and by which the qualification of a director was to be thirty shares. I think that, putting the provisions of the Act together, it is not straining the words of the Act to say that he consented to be a director and to be qualified as the holder of thirty shares; and the meaning of the Act is, that directly the Act passed he did become a director and the possessor of that number of shares. The question, then, remains, whether the plaintiff was a shareholder within the 36th section of the Companies Clauses Consolidation Act. I agree with the Court below that that section ought to be interpreted according to the definition in the 3rd section. It is not necessary to express any opinion on the decisions as to what would constitute a register for the purpose of actions for calls. The present case is different. I think that under the 36th section execution may issue against a person who by the special Act itself is made a director, a member of the company, and a shareholder. If not, the defendant and the other directors might render the working of the Act impracticable, and deprive the plaintiff of the benefit of the contract between him and the company by their own omission to take the necessary steps. It would be most unreasonable to say that before the plaintiff could make these gentlemen liable he must get a mandamus to compel them to make a register. Even assuming that an ordinary shareholder could not be liable to a sci. fa. until a register

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had been formed, a question which it is not necessary to decide, I think the plaintiff, by the terms of the special Act and the Companies Clauses Consolidation Act, is clearly a shareholder, and therefore liable.

POLLOCK, B. I agree that the decision should be affirmed. The defendant, it appears to me, was constituted a shareholder to the extent of thirty shares by the special Act. The fact that the directors have not done anything in the execution of the Act, and have themselves failed to exercise the functions of directors, cannot absolve them from the liability that would otherwise be imposed upon them.

Decision affirmed.

Solicitors for plaintiff: *Clarke, Rawlins & Clarke.*
Solicitors for defendants: *Tatham & Sons.*

May 8. HOWES AND PEIRCE, APPELLANTS; TURNER AND WRIGHT, RESPONDENTS.

Municipal Elections Act, 1875 (38 & 39 *Vict. c.* 40), *s.* 1, *subss.* 1, 2, *and* 3—*Defective Notice by Town-clerk as to the Time for delivering Nomination-papers—Power and Duty of Mayor—Jurisdiction of the Court—Corrupt Practices (Municipal Elections) Act*, 1872 (35 & 36 *Vict. c.* 60), *ss.* 12, 15—*Avoidance of Election.*

Sect. 1, subss. 1, 2, and 3, of the Municipal Elections Act, 1875, provide that *nine days at least* before any election of town-councillors, the town-clerk shall publish a notice intimating the last day on which nomination-papers (which are to be signed by the candidate, his proposer and seconder, and by eight burgesses, and delivered by the candidate himself or by his proposer and seconder) are to be delivered to him (which day is to be *seven days at least* before the day of election), and the day and hour at which the mayor will attend to hear and determine objections thereto.

At the annual election of town-councillors for 1875, the town-clerk of N. issued a notice in the prescribed form, but erroneously stating the last day for the delivery of nomination-papers to be Saturday, the 23rd of October, which did not leave seven *clear* days between that day and the day of election, Nov. 1. W., a candidate for one of the two vacancies, duly delivered his nomination-paper at the town-clerk's office on Friday, the 22nd of October; but, inasmuch as one of the eight burgesses had written one of his Christian names with a contraction, "Fred^k.," W., supposing that to be a fatal objection, without notice and without the knowledge of the town-clerk, got the paper back from a clerk in the office

and returned it on the following day re-signed by the burgess. T., another candidate, delivered his nomination-paper on Saturday, the 23rd. H. and P., two other candidates who had duly delivered their nomination-papers on Friday, the 22nd, objected to the allowance of the nomination-papers of W. and T. The mayor (assuming to have authority to hear it) disallowed the objection, and the result of the poll was that W. and T. were declared duly elected. H. and P. thereupon filed a petition against this return, but did not claim to be seated.

Upon a special case setting out the facts for the opinion of the Court:—

Held, 1. That the mayor had no power to deal with the objection as to the time of delivering the nomination-papers, and that his decision might be questioned on petition.

2. That the nomination-paper of W. must be taken to have been delivered on Friday, the 22nd, and was therefore in time, the taking it away for an unnecessary alteration not being done with intent to withdraw it.

3. That the nomination-paper of T., though delivered in accordance with the terms of the town-clerk's notice, was delivered too late.

4. That the notice published by the town-clerk being so defective as to be calculated in the opinion of the Court to mislead the candidates and so prevent a fair election, the whole proceeding must be declared void and a new election ordered.

THIS was a petition presented by Richard Howes and Robert John Peirce against the return of Richard Turner and Thomas Wright as town-councillors for the East Ward of the borough of Northampton; and by order of Denman, J., the following case was stated for the opinion of the Court:—

1. The borough of Northampton is a borough incorporated under the name of the mayor, aldermen, and burgesses of the Borough of Northampton, having a mayor, six aldermen, and eighteen councillors. The borough is divided into three wards, one of which is called the East Ward. The East Ward is represented in the council of the borough by six councillors who are elected from the burgesses duly qualified in that behalf. Two of such councillors retire annually, on the 1st of November, when two fresh ones are elected, or the same re-elected.

2. On the 19th of October, 1875, Mr. William Shoosmith, the town-clerk for the said borough, published a notice that the nomination-papers of candidates at the forthcoming election of two councillors for the wards of the said borough were to be delivered to him at his office before 5 p.m. on Saturday, the 23rd of October, 1875, and that the mayor of the said borough (Mr. William Adkins) would attend at the town-hall on Monday, the 25th of October, 1875, from 2 to 4 o'clock in the afternoon, to hear and

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decide objections to nomination-papers. A copy of the notice was annexed to the case.

3. The petitioners, being duly qualified burgesses, were nominated as candidates at the said election for the East Ward, and their respective nomination-papers were duly signed by properly qualified persons, and were duly delivered to the town-clerk before 5 p.m. on Friday, the 22nd of October, 1875, in accordance with the Municipal Elections Act, 1875, 38 & 39 Vict. c. 40.

4. The respondent Thomas Wright, being also a duly qualified burgess, was nominated as a candidate at the said election for the East Ward, and his nomination-paper in like manner, signed in the manner hereinafter appearing, was delivered to the town-clerk before 5 p.m. on Friday, the 22nd of October, 1875, in accordance with the said Act, and was accepted and received by the town-clerk as a due and proper nomination of Thomas Wright; and the town-clerk placed the said nomination-paper with the other papers relating to the said election. Afterwards, on the same day, Thomas Wright, without the sanction, authority, or knowledge of the town-clerk, obtained the said nomination-paper from one of the town-clerk's clerks (who had no authority to give up the same), for the purpose of getting one of the proposers, who had signed one of his Christian names abbreviated (1), to sign it in full; and Thomas Wright, having got the signature altered accordingly, delivered back the nomination-paper at the town-clerk's office on the following day before 5 p.m.

5. The respondent Richard Turner, being also a duly qualified burgess, was nominated as a candidate at the said election for the East Ward, and his nomination-paper, duly signed, was delivered to the town-clerk before 5 p.m. on Saturday, the 23rd of October, 1875.

6. On the said 23rd of October, 1875, the mayor of the borough did not attend at the town-hall; but, on Monday, the 25th of October, 1875, according to the above-mentioned notice of the town-clerk, he attended at the town-hall between the hours of 2 and 4 p.m., as mentioned in the statute, to decide on the validity of objections made to nomination-papers. An agent on behalf of the petitioner William John Peirce then appeared

(1) "Fred^{k}" instead of "Frederick."

before the mayor, and contended that the nomination of the respondents was not legal and ought not to be allowed. The mayor, having heard the said contention, disallowed the objection. No objection was made to the right or authority of the mayor then to hear such contention and to determine such objection.

7. On the said 25th of October, 1875, the town-clerk published the names of the petitioners and respondents as candidates for the office of councillors in the East Ward, in the form required by the statute, and notice was given that the elections for the said ward would be proceeded with on the 1st of November, 1875, according to notice.

8. On the 1st of November, 1875, the poll was taken in the usual manner for all the four candidates aforesaid, when the returning officer declared that the respondents were duly elected by a majority of votes to fill the two vacancies in the said East Ward.

9. On the 20th of November, 1875, the petition in this case was filed, but it was not served upon the returning officer, nor was any notice thereof given to him; and on the 11th of January, 1876, the order of Denman, J., was made herein.

The questions for the opinion of the Court were,—1. Whether the election of the respondents under the circumstances can be questioned by petition,—2. Whether the respondents were duly elected and returned,—3. Whether the petitioners were elected and ought to have been so returned pursuant to the statute in that behalf, or whether there ought to be a fresh election.

Cave, Q.C. (*A. L. Smith* with him), for the petitioners. The petitioners are the only persons who were duly nominated, and consequently the only persons who should have been returned as duly elected. By s. 1, subs. 1, of the Municipal Elections Act, 1875 (38 & 39 Vict. c. 40), it is provided that "nine days at least before any such election, the town-clerk shall prepare, sign, and publish a notice in the form No. 1 set forth in the first schedule to this Act, or to the like effect, by causing the same to be placed on the door of the town-hall and in some conspicuous parts of the borough or ward for which any such election is to be held." And subs. 3 provides that "every nomination-paper subscribed as aforesaid

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[subs. 2] shall be delivered by the candidate himself or his proposer or seconder to the town-clerk seven days at least before the day of election, and before 5 o'clock in the afternoon of the last day on which any such nomination-paper may by law be delivered: the town-clerk shall forthwith send notice of such nomination to each person nominated." The duty thus cast upon the town-clerk is directory only. The notice here was published on the 19th of October, and required the nomination-papers to be delivered to him before 5 p.m. on Saturday the 23rd, which, as Sundays are excluded from the computation (s. 11), did not leave seven days at least,—which means seven clear days: *Zouch* v. *Empsey* (1),—between that day and the day of election, the 1st of November. The petitioners delivered their nomination-papers on Friday, the 22nd of October, which was in due time. Turner's nomination-paper was not delivered until the 23rd, which was too late. Wright's nomination-paper was delivered, but in an imperfect state, on Friday, the 22nd, but was taken away from the office, and returned amended on the following day. Wright's case, therefore, in no respect differs from Turner's: and, as the petitioners were the only persons duly nominated, they should have been declared to be duly elected: see 22 Vict. c. 35, s. 8.

[DENMAN, J. Was Wright's a good nomination-paper when first delivered to the town-clerk?]

No doubt it was. *Mather* v. *Brown* (2) does not touch this case: there, the party whose signature was defective was the candidate himself.

[BRETT, J. The question is whether this was a withdrawal at all.]

It is said that this objection is cured by what took place before the mayor on Monday, the 25th. That depends upon subs. 3 of s. 1, which provides that "The mayor shall attend at the town-hall on the day next after the last day for the delivery of nomination-papers to the town-clerk, between the hours of two and four in the afternoon, and shall decide on the validity of every objection made to a nomination-paper, such objection to be made in writing:" "and each candidate and the person appointed by him shall, during the time appointed for the attendance of the mayor for the

(1) 4 B. & Ald. 522. (2) Ante, p. 596.

purposes of this section, have respectively power to object to the nomination-paper of every person nominated at the same election. The decision of the mayor, which shall be given in writing, shall, if disallowing any objection to a nomination-paper, be final, but, if allowing the same, shall be subject to reversal on petition questioning the election or return." This was not an objection which it was competent to the mayor to entertain at all: his duty is merely ministerial, to decide on objections to the form of nomination-papers, and he must be strictly limited to that: *Reg.* v. *Ledgard* (1), per Littledale, J. The objection here was, that there was no nomination-paper at all before him. As to his jurisdiction, see the Ballot Act, 35 & 36 Vict. c. 33, sched. 1, rules 6, 12, 13.

The next question is, whether this is the proper subject of a petition, or whether the objection is only to be taken advantage of on a quo warranto. By s. 12 of the Corrupt Practices (Municipal Elections) Act, 1872, 35 & 36 Vict. c. 60, it is enacted that "the election of any person at an election for a borough or ward may be questioned by petition before an election court constituted as hereinafter (s. 14) in this Act provided, and hereinafter in this Act referred to as the 'Court,' on the ground that the election was as to the borough or ward wholly avoided by general bribery, treating, undue influence, or personation, or on the ground that the election of such person was avoided by corrupt practices or offences against this Act committed at the election, or on the ground that he was at the time of the election disqualified for election to the office for which the election was held, or on the ground that he was not duly elected by a majority of lawful votes. An election shall not, except in the manner provided by this Act, be questioned upon an information in the nature of a quo warranto or by or in any process or manner whatsoever for a matter for which it might be questioned under the provisions of this Act." It might be sufficient to rely upon that provision. If the number of candidates duly nominated does not exceed the number of vacancies, by s. 8 of 22 Vict. c. 35, there is no necessity for a poll: per Lush, J., in *Reg.* v. *Parkinson.* (2)

[BRETT, J. There is no claim to be seated.]

(1) 8 Ad. & E. 535, 545.

(2) Law Rep. 3 Q. B. 11.

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J. O. Griffits, Q.C. (*Anstie* with him), for the respondents. If the notice by the town-clerk is a condition precedent to the validity of the election, this notice was clearly a day too late, and there must be a new election. It is a blunder which avoids the election altogether. But the question is whether this is a matter that can be disposed of by petition. The grounds upon which the election of any person at an election for a borough or ward may be questioned by petition before an election court are four only,—1. On the ground that the election was as to the borough or ward wholly avoided by general bribery, treating, undue influence, or personation,—2. On the ground that the election of such person was avoided by corrupt practices or offences against the Act committed at the election,—3. That he was at the time of the election disqualified for election to the office for which the election was held, —4. On the ground that he was not duly elected by a majority of lawful votes: 35 & 36 Vict. c. 60, s. 12. "Disqualification" in that section is something personal, and has no reference to the sufficiency or insufficiency of the nomination-paper. The only remedy for a void election on account of a defective notice is mandamus or quo warranto. If this provision as to the notice is directory only, that would afford a strong argument to shew that all the other provisions as to the nomination-papers are directory also. The decision of the mayor disallowing an objection to a nomination-paper is to be final; but if allowing it, it is to be subject to reversal on petition questioning the election or return: 38 & 39 Vict. c. 40, s. 1, subs. 3. His jurisdiction is not confined to the form of the nomination-paper only, but also as to the time of delivery. As to Wright's case,—his nomination-paper was a good and perfect one when received by the town-clerk; and Wright himself could only get rid of it by virtue of the provision in s. 7.

[ARCHIBALD, J. Sect. 15, subs. 4, enables the Court to declare the election void.]

Cave, Q.C., in reply. An Act of Parliament is never held to be directory in part and in part obligatory or imperative without clear and unambiguous words. Wright was entitled to take away his nomination-paper for the purpose of getting it amended, and

its validity must depend upon its being returned to the town-clerk before 5 o'clock on the last day for the delivery of nomination-papers.

BRETT, J. The material facts are these,—The notice given by the town-clerk under s. 1 of the Municipal Elections Act, 1875 (38 & 39 Vict. c. 40), was a bad notice: though issued in proper time, it gave notice that nomination-papers of candidates at the forthcoming election of councillors were to be delivered to him on Saturday, the 23rd of October, whereas they should have been delivered to him on the 22nd. The nomination-papers of the petitioners were delivered in time, viz. before 5 p.m. on the 22nd. The nomination-paper of Wright, one of the respondents, was also given to the town-clerk in time; but, on the same day, Wright, without the sanction or knowledge of the town-clerk, got it back from a clerk in the office for the purpose of correcting a supposed mistake in it, and returned it to the town-clerk's office on the following day before 5 p.m. The nomination-paper of Turner, the other respondent, was duly signed, but was not delivered to the town-clerk until Saturday, the 23rd, which was not in proper time. The mayor attended at the town-hall on Monday, the 25th, to hear objections to nomination-papers, when it was contended that those of the respondents were illegal and ought not to be allowed: the mayor, however, disallowed the objection. The poll was taken in the usual way on the 1st of November, and the respondents were declared duly elected. The question is, what is to be done with the election.

On the one side it is said that the election is altogether void by reason of the town-clerk's mistake; and upon this a question has been raised as to whether we can or cannot declare the election to be void, it being contended on the one hand that we have no jurisdiction, but that the only remedy is by an information in the nature of a quo warranto in the Queen's Bench Division, and on the other that we have such jurisdiction; and then arises another question, viz. whether for this mistake of the town-clerk we are bound to declare the election altogether void, or whether we may hold that some of the defects will render it void and some not. It has

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been further suggested on the part of the respondents, that, the mayor having heard the objections to their nomination-papers and having disallowed them, his decision is final, and we have no jurisdiction in the matter.

Now, with regard to the decision of the mayor, that seems to me to have been, not a decision on the form of the nomination-papers, but upon the objection raised as to the time of their delivery. Looking at the power given to the mayor by subs. 3 of s. 1 of the Act, it seems to me that the only office of the mayor is to decide objections to the paper itself, and that his decision as to such objections only is final, and therefore that this question is still open to us.

As to the time of delivery of the nomination-papers to the town-clerk. Wright's nomination-paper was delivered at first in proper time, but was withdrawn for the purpose of correcting a supposed insufficiency, one of the Christian names of one of his proposers having been abbreviated. I do not think that was matter that could at all mislead: it was, in my opinion, a good nomination-paper when delivered. If it had been taken back by the candidate for the purpose of withdrawing it, I should say that the second delivery, which took place on the following day, was the true delivery, and that the nomination was bad. So, if the nomination-paper was bad when first delivered, and corrected and re-delivered on the Saturday, I should hold the nomination to date of its delivery as corrected. But, the nomination-paper having been a good nomination when delivered at the town-clerk's office on Friday, and taken away merely for the purpose of making it more correct, but without any intention to withdraw it, I cannot think the nomination affected by what took place. The nomination-papers of the petitioners were duly delivered. That of one of the respondents was delivered in time; that of the other was too late, he having been misled by the wrongful form of the notice issued by the town-clerk.

Then comes the question whether this is the proper Court to deal with the validity of that notice, and what is to be the result of the blunder of the town-clerk. The jurisdiction of this Court cannot be larger than that of the election court; and that depends

upon ss. 12 and 15 of the Corrupt Practices (Municipal Elections) Act, 1872, 35 & 36 Vict. c. 60. Sect. 12 enacts that "the election of any person at an election for a borough or ward may be questioned by petition before an election court constituted as hereinafter in this Act provided and hereinafter in this Act referred to as the 'Court,' on the ground that the election was as to the borough or ward wholly avoided by general bribery, treating, undue influence, or personation, or on the ground that the election of such person was avoided by corrupt practices or offences against this Act committed at the election, or on the ground that he was at the time of the election *disqualified for election* to the office for which the election was held, or on the ground that he was not duly elected by a majority of lawful votes." It is said that that means *personal* disqualification only, and that for anything else recourse must still be had to a quo warranto. But the end of the section provides that "an election shall not, except in the manner provided by this Act, be questioned upon an information in the nature of a quo warranto or by or in any process or manner whatsoever for a matter for which it might be questioned under the provisions of this Act." If the first part of the section is to be read as including personal disqualification, and there is no provision in the Act for the trial of such a question as is now raised otherwise than by petition, the case is within the exception. I think disqualification is not to be read in the limited sense which has been contended for. The petition is to be tried before an election court; and, taking ss. 12 and 15 together, it is clear that this Court has the same power to deal with the matter. The legislature evidently intended to send all questions for the determination of this Court after they had been first inquired into by an election tribunal. I think we have jurisdiction to determine what is the effect of the notice given by the town-clerk.

It is said that if the notice, though in the very form given in the schedule, be inaccurate, the whole election must be declared void, although no person has been misled by it, it being a condition precedent. I cannot think that is so. I do not think that a mere defect in the notice which misleads no one can have the effect of rendering the election altogether void. But it is another thing

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to say that no defect in the notice will avoid the election. In my opinion, if the defect be so great that the electors or a great number of them are misled, and so the result of the election is contrary to the real views of the constituency, the Court may declare the election to be void: there has in truth been no election at all.

Here, it is clearly proved that one of the candidates was misled by the error in the notice,—an error which even a skilful person might very well have committed. It is impossible to say which of the candidates would have been elected if that mistake had not occurred. It seems to me, therefore, that such a defect as has had that result is fatal, and on that ground I think we ought to hold this notice to be so bad as to have rendered the whole election void, and under the circumstances to have disqualified the successful candidate from being elected. I therefore think we are bound to declare the election void, and that a new election must take place.

DENMAN, J. I am of the same opinion. As to the power of the mayor, I agree with my Brother Brett that subs. 3 of s. 1 of 38 & 39 Vict. c. 40 was not intended to give the mayor power to dispense with the statutory day for the delivery of nomination-papers. A mistake in the notice in that respect was beyond his power to cure: and it follows that, if the mayor has no power to give a final decision on that, it must be for the Court. That it is for this Court to determine whether or not a candidate is disqualified or unduly elected seems to me to follow from our decision in *Mather* v. *Brown*. (1) I also agree that this is a case which is provided for by s. 12 of the Corrupt Practices (Municipal Elections) Act, 1872, which enacts that the election of any person at an election for a borough or ward may be questioned by petition before an election court, on the ground, amongst others, "that he was at the time of the election disqualified for election, or on the ground that he was not duly elected by a majority of lawful votes." It is contended that this Court has no power to avoid the election. That, however, is an erroneous view of the powers of the Court; for, s. 15, subs. 4, provides that, "at the conclusion of the trial the Court

(1) Ante, p. 596.

shall determine whether the person whose election is complained of, or any and what other person, was duly elected, or whether the election was void." That seems to me to impose upon the Court the duty of determining upon the facts whether or not a successful candidate is properly elected or whether some other person ought to have been elected. It seems to me to be impossible upon the state of facts presented to us in this case to say that the election of some of the candidates was good, and that of others bad, and therefore we are driven to the last alternative, and are bound to declare the election to be void.

ARCHIBALD, J. I am of the same opinion. I agree with my Brother Brett that the mayor had power only to decide upon the form of the nomination-papers, and not as to the qualifications of the candidates. As to the nomination-paper of the defendant Wright, if it was good when first delivered, and not taken away with the intention of withdrawing it, I should hold that the delivery took place in time. If, on the other hand, it was not sufficient when first delivered, it could only be withdrawn on giving notice; and, if taken away to be amended, it would only be delivered when it was brought back in its amended state. Now, it is conceded here that the paper was sufficient when first delivered, and only taken away for the purpose of obviating a supposed mistake. But I found my decision on this, that the notice given by the town-clerk named too late a day for the last day on which the delivery of nomination-papers could take place. The 38 & 39 Vict. c. 40 repeals s. 5 of 22 Vict. c. 35, and provides in s. 1, subs. 1, that the town-clerk shall prepare, sign, and publish a notice in the form set forth in the schedule No. 1, nine days at least before the election; and in subs. 3 that nomination-papers must be delivered to the town-clerk seven days at least before the day of election. The election in question was the ordinary annual election which was to take place on the 1st of November. The town-clerk on the 19th of October issued a notice that the nomination-papers of candidates were to be delivered at his office before 5 p.m. on Saturday, the 23rd, and that the mayor would attend at the town-hall on Monday, the 25th, from 2 to 4 in the afternoon to hear and decide objections. This notice did not leave seven

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clear days between the 23rd of October and the day of election. Wright's nomination-paper was in my opinion delivered in time; but that of the respondent Turner was delivered a day too late: and the question is whether he was misled by the town-clerk's notice. The only inference which I can draw from the statements in the case is, that, in consequence of the insufficiency of the notice, he was misled. Even if this clause is directory only, if the directions of a statute are so far departed from as to mislead a candidate, that is enough to render the election void. It is said that we have no jurisdiction to set aside the election. But, looking at the provisions of the Corrupt Practices (Municipal Elections) Act, 1872, it seems to me that it was the intention of the legislature to refer to the newly-created tribunal all questions of this sort. The Act recites that "it is expedient to make provision for the better prevention of corrupt practices at municipal elections, and for establishing a tribunal for the trial of the validity of such elections." Sect. 14 constitutes the election court; and s. 12 in terms states what matters the election court is to deal with,—amongst others, the question whether the person elected was at the time of election disqualified for election. But, when we look to s. 15, subs. 4, we find that the Court is to determine "whether the person whose election is complained of, or any and what other person, was duly elected, or whether the election was void." For these reasons, I think we have jurisdiction, and are bound to hold this election to be void, and to order that a new election shall take place.

Cave, for the petitioners, asked for costs.

PER CURIAM. Under the circumstances, we think this is not a case for costs.

Rule accordingly. (1)

Solicitors for petitioners: *Elwes & Sharp, for George Rands, Northampton.*

Solicitors for respondents: *Vizard, Crowder, & Co., for William Shoosmith, Northampton.*

(1) See next case.

MONKS, PETITIONER; JACKSON, RESPONDENT. 1876 July 17.

Municipal Elections Act, 1875 (38 & 39 *Vict. c.* 40, *s.* 1), *subs.* 3—*Nomination Papers delivered by an Agent—Petition questioning Decision of Mayor* —22 *Vict. c.* 35, *s.* 8.

Under the Municipal Elections Act, 1875 (38 & 39 Vict. c. 40), s. 1, subs. 3, the nomination-paper must be delivered to the town-clerk by the candidate himself, or by his proposer or seconder personally, and not by an agent. And the objection is one which is cognizable by the mayor, whose decision allowing it may be questioned on a petition against the return of the successful candidate.

SPECIAL case stated for the opinion of this Court pursuant to a judge's order under the Municipal Elections Act.

1. The municipal borough of Wigan, in the county of Lancaster, comprises five wards, that is to say, No. 1, or Scholes's Ward, No. 2, or St. George's Ward, No. 3, or Queen Street Ward, No. 4, or Swiney Ward, and No. 5, or All Saints Ward. Each of these wards is entitled at the ordinary municipal elections holden on the 1st of November in each year to be represented by two councillors to be then elected by the duly-qualified burgesses.

2. In 1875, the town-clerk of the borough, pursuant to the statute 38 & 39 Vict. c. 40, duly and in due time gave public notice that the last day for delivering nomination-papers for the nomination of candidates at the then ensuing election of councillors was Friday, the 22nd of October, 1875.

3. Upon the 22nd of October in due time nomination-papers nominating the respective petitioners (1) as candidates respectively for the respective wards in the petitions mentioned were delivered to the town-clerk by one Thomas Scott, being then the agent of the petitioners and their respective proposers and seconders authorized by them in that behalf; but the said nomination-papers were not otherwise delivered to the said town-clerk by the respective petitioners or their proposers or seconders respectively.

4. The said town-clerk forthwith on the same day sent notices to the petitioners that they had been nominated. The said

(1) There were several other petitioners and respondents whose cases were identical with that of Monks and Jackson respectively.

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notices (mutatis mutandis) were in the words following, that is to say,—

Borough of Wigan.

Municipal Election, 1875. Take notice that you have been nominated by the burgesses whose names and addresses are mentioned below as a candidate for election as councillor for No. 1, or Scholes's ward of this borough. Dated 22nd October, 1875. W. M. Peace, Town-clerk.

5. Copies of the several nomination-papers were annexed to and were to be taken as forming part of the case.

6. The numbers purporting to be numbers of the proposers, seconders, or assenters, as the case may be, of the persons nominated as candidates (where numbers appeared opposite the several names on the nomination-papers) were taken from the burgess-roll or ward list for the ward to which the nomination-papers respectively related which came into operation on the 1st of November, 1875, and not from the burgess-roll or ward list which came into operation on the 1st of November, 1874, and which the respondents affirm and the petitioners deny to be the burgess-roll or ward list for the time being in force and applicable to the said nominations on the said 22nd of October, 1875. On the last-mentioned date there were no numbers on the burgess-roll or ward list for All Saints Ward, which came into operation on the 1st of November, 1875. Both the burgess-rolls and ward lists were annexed to and were to be taken as forming part of the case.

7. The mayor of the borough under the Act of Parliament in that behalf appointed the 23rd of October, between the hours of two and four of the clock in the afternoon, for the reception of any objections to nomination-papers; and the mayor attended on that day between those hours at the borough court and offices of the borough for the purpose of hearing and deciding upon any objections that might be made to any nomination-paper. The mayor attended for the purposes aforesaid at two o'clock. The respondents did not nor did any person on their behalf appear until after three o'clock, when they appeared for the purpose of making their objections to the said nomination-papers. The respondents had then and there their respective written objections to the said nomination-papers in their hands, and were then ready and pre-

pared to deliver them to the said mayor, as the mayor then knew. Several of the respondents were in the act of handing their written objections to the mayor, which the mayor seeing, he said to the respondents, "We cannot deal with all the objections at once; it would be more convenient that we should take the objection to each nomination-paper as we come to it in order." The nomination-papers were before the mayor, and all fastened together. The nomination-paper relating to Knowles, a candidate for No. 1, or Scholes's Ward, was the first nomination-paper in order. This paper was read by the town-clerk in the presence and hearing of the mayor, and then a written objection to this nomination-paper was handed to the mayor by Mr. Jackson, who was a candidate at the said election for the same ward. Wright (who appeared before the mayor on behalf of all the persons objected to) argued the case for one side, and France (who appeared for all the objectors and the respondents) argued the case on the other. The only ground of objection argued was the ground hereinafter referred to as No. 5. The mayor, after argument, decided to disallow and disallowed the said ground of objection No. 5. The hour of four o'clock had passed before the said disallowance by the mayor. (No written objection to any of the nomination-papers of the petitioners or any of them had been before four o'clock delivered to the mayor by any person, save as here appears). Immediately after the said disallowance the respondent Jackson delivered to the mayor an objection in writing to the nomination-paper of the petitioner Monks. Monks objected to such last-mentioned objection being received, the hour of four o'clock having then passed; but the mayor received the objection, and proceeded to hear and adjudicate upon the same. The ground of objection in the margin numbered 3 was argued on behalf of Jackson and Monks respectively; and the mayor thereupon decided to allow and allowed the same. Subsequently, and after the mayor had adjudicated as last aforesaid, objections in writing to the nomination-papers of the other petitioners were successively handed in on behalf of the respective respondents, and a like objection to the reception thereof after four o'clock was made to each in succession by each petitioner when and as the same respectively were so handed in. The same were received successively by the

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mayor. The respective grounds of objection to the respective nomination-papers being identical, no separate or subsequent arguments took place thereon; the decision in the case of the petitioner Monks was taken to apply to and govern the whole, and the mayor allowed all the objections successively upon the said ground. No other ground was argued before the mayor. The said arguments and proceedings before the mayor were continuous acts and proceedings, and lasted till about five o'clock in the afternoon of the said 23rd of October. The mayor acted in the matter honestly and fairly with the intention of complying with the provisions of the Act of Parliament in that behalf. The objection paper signed by Hilton was signed by him after four o'clock. Before four o'clock it was signed by a person of the name of E. Hayes, a burgess, who had no authority to sign the same.

8. Copies of the said objections in writing were annexed to and were to be taken as part of the case. (1) The numbers in the margin were inserted for the purposes of this case.

(1) The notice of objection in Monks' case was as follows:—

Borough of Wigan.

Election of councillors of or for No. 1 or Scholes's ward in the said borough, to be held on the 1st day of November, 1875.

To James Burrows, Esq., mayor of the said borough and returning officer, and to M. W. Peace, Esq., the town-clerk of the said borough, and all other persons whom it may concern.

Take notice that I the undersigned, being an inrolled burgess of or for No. 1 or Scholes's Ward in the said borough, do hereby object to the paper writing purporting to be a nomination-paper of E. H. Monks as a candidate at the election of councillors of or for the said ward to be held on the 1st day of November, 1875, on the following grounds,—

1. That the said E. H. Monks has not been duly nominated as by law required.

2. That the paper writing purporting to be a nomination-paper of the said E. H. Monks as a candidate at the said election was not and is not signed or subscribed by two inrolled burgesses of such ward as proposer and seconder, and by eight other inrolled burgesses of such ward as assenting to the nomination of the said E. H. Monks as a candidate in the said election.

3. That the persons who have signed or subscribed the said paper writing as proposer and seconder of the said E. H. Monks as a candidate at the said election, and the eight other persons who have signed or subscribed the said paper writing as assenting to such nomination as aforesaid, were not respectively inrolled burgesses on the burgess-roll or ward list in force upon the date of the said paper writing, nor were their respective names in or upon the said burgess-roll or ward list.

4. That the said paper writing is not signed or subscribed by the persons purporting to be the proposer and seconder of the said E. H. Monks and

9. The mayor reduced to writing his decisions in the premises; and copies of such written decisions were annexed to and were to be taken as part of this case.

10. The mayor afterwards duly by public notice in that behalf declared the respective respondents to have been respectively returned as councillors for the borough, and the respondents had since acted and claimed to act as such councillors.

11. Copies of the petitions were annexed and were to be referred to and taken as part of the case.

12. The Court was to have power to draw inferences of fact.

13. The petitioners were to be at liberty on the argument of the case to contend that the mayor had no power to decide upon or to allow the grounds of objection numbered 5, and that the respondents could not on these petitions raise the question whether such objections were good.

The questions for the opinion of the Court were,—

1. Whether the objections to the nomination-papers were made too late.

2. Whether it was competent to the mayor to decide the objections after the hour of four o'clock on the 23rd of October.

3. Whether the decisions of the mayor were erroneous and ought to be reversed.

4. Whether the respondents were respectively duly elected.

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by the persons purporting to assent to the nomination of the said E. H. Monks, with their numbers on the burgess-roll or ward list in force at the date of the said paper writing, and does not truly or at all state or describe the situation of the property in respect of which they are respectively inrolled on the said burgess-roll or ward list of the said ward, and that the persons respectively signing such paper writing as proposer and seconder of the said E. H. Monks and as assenting to his nomination have not correctly or at all described their respective numbers on the said burgess-roll or ward list in force upon the date of the said paper writing.

5. That such paper writing was not delivered by the said E. H. Monks himself or his proposer or seconder to the town-clerk of the said borough seven days at least before the said day of election, excluding Sundays, and before 5 o'clock in the afternoon of Friday the 22nd day of October, 1875, such last-mentioned day being the last day upon and 5 o'clock in the afternoon of the same day being the time or hour before which by law such paper writing ought to have been delivered to the said town-clerk at or for the said election. Dated, &c.,

Peter Jackson, of &c., No. 1139 on the burgess-roll or ward list now in force.

The objections in all the other cases were the same.

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The Court to make such order in the premises and in the matters of the said petitions as to the Court might seem fit. The costs of each petition were to abide the event thereof, and the Court to make an order to carry out such arrangement.

M'Intyre, Q.C. (*Bigham* and *W. Hardy* with him), for the petitioners. The 5th objection could not be dealt with by the mayor, and is not recognizable here: and, if the mayor could entertain it, he has decided it, and his decision is final. The mayor is to decide on the validity of every objection made to a nomination-paper: and his decision, if disallowing an objection to a nomination-paper, is to be final, but, if allowing the same, is to be subject to reversal on petition questioning the election: 38 & 39 Vict. c. 40, s. 1, subs. 3. The first part of that subsection is directory only.

[LORD COLERIDGE, C.J. *Howes* v. *Turner* (1) seems to decide that the first part of subs. 3 is imperative.]

This was not an objection to a nomination-paper; or, if it was, the mayor's decision was final, and this Court has no jurisdiction to entertain the matter. There is nothing in the Act giving the Court a primary jurisdiction otherwise than upon a petition against a decision of the mayor upon questions which properly arise before him. Upon this proceeding, all that is submitted to the Court is the validity or invalidity of objections which have been allowed by the mayor.

[LORD COLERIDGE, C.J., referred to *Northcote* v. *Pulsford*. (2)

ARCHIBALD, J. The petitioners must shew that they were entitled to be candidates.

LORD COLERIDGE, C.J. If upon the face of the case it appears that there is a fatal objection to your being petitioners, are we not to decide upon that matter?]

That can only be inquired into upon a quo warranto. The 35 & 36 Vict. c. 60, s. 15, subs. 9, is limited to the case where the seat is claimed. Wherever a thing is required to be done, it may be done by a duly authorized agent, unless the intervention of an agent is directly prohibited.

[LORD COLERIDGE, C.J. The whole context shews that this is a personal matter.]

(1) Ante, p. 670. (2) Law Rep. 10 C. P. 476.

The general scope and object of the Act is satisfied if the nomination-paper comes properly to the hands of the town-clerk, and is properly published by him.

Herschell, Q.C. (*Chandos Leigh* and *Geary* with him), for the respondents. Subs. 4 provides that s. 8 of 22 Vict. c. 35, so far as the same is now in force, shall apply to nominations of councillors; and that section provides that, "at any election of councillors to be held for any borough or ward, if the number of persons so nominated shall exceed the number to be elected, the councillors to be elected shall be elected from the persons so nominated, and from them only;" and that, "if the number of persons so nominated shall be the same as the number to be elected, such persons shall be deemed to be elected." That shews that none can be allowed to go to the poll but such as are *duly* nominated. [He was stopped by the Court.]

LORD COLERIDGE, C.J. I am of opinion that our judgment should be for the respondents. Mr. M'Intyre admits that, if the decision is against him upon the 5th question, it will be useless to discuss the other points raised, because the election of the respondents cannot be questioned. Subs. 3 of s. 1 of 38 & 39 Vict. c. 40, enacts that every nomination-paper, subscribed as aforesaid (1) shall be delivered *by the candidate himself, or his proposer or seconder*, to the town clerk seven days at least before the day of election, and before five o'clock in the afternoon on the last day on which any such nomination-paper may by law be delivered," &c. The persons petitioning here are persons who complain of the way in which the election was conducted, because they say they were duly nominated as candidates, and that if they had not been prevented from going to the poll the result of the election might have been otherwise. It is true they were not prevented from going to the poll by reason of any objection to the nomination-paper. But they question the election, and upon this special case we have to determine whether or not the respondents were duly elected. The 3rd paragraph of the special case states that, "upon the 22nd of October in due time nomination-papers nominating the respective

(1) By two inrolled burgesses of the borough or ward as proposer and seconder, and by eight other inrolled burgesses of such borough or ward as assenting to the nomination: subs. 2.

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petitioners as candidates for the respective wards in the petition mentioned, were delivered to the town-clerk by one Scott, being then the agent of the petitioners and their respective proposers and seconders authorized by them in that behalf; but the said nomination-papers were not otherwise delivered to the town-clerk by the respective petitioners or their proposers or seconders respectively." The case therefore shews on the face of it that the petitioners were not duly nominated as candidates, and had no right to go to the poll, and that if they had been elected their election must have been set aside. I am clearly of opinion that the early part of 38 & 39 Vict. c. 40, s. 1, subs. 3, is imperative and not merely directory. It further appears from s. 8 of 22 Vict. c. 35, which was referred to by Mr. Herschell, and which is incorporated in the 1st section of the Act in question, that, if the petitioners were not duly nominated, it was the duty of the mayor to declare the candidates who were duly nominated to be elected. And, it appearing on the face of the case that the petitioners were not duly nominated, there is no ground for questioning the election of the respondents. We are, therefore, bound to give our judgment in favour of the latter.

ARCHIBALD, J. I also am of opinion that it is conclusively shewn on the face of the special case that the petitioners were not entitled to be candidates at the election. The 3rd subs. of s. 1 of 38 & 39 Vict. c. 40 enacts that the nomination-paper "shall be delivered by the candidate himself or his proposer or seconder to the town-clerk." How the legislature could more clearly indicate that the paper shall be delivered by the candidate himself or by his proposer or seconder personally, it is difficult to conceive. That part of the section is clearly obligatory, and is not complied with by a delivery of the nomination-paper to the town-clerk by an agent. The fact being stated upon the face of the case, the petitioners are shewn not to be qualified to appear to question the validity of the election.

Judgment for the respondents.

Solicitors for petitioners: *Chester, Urquhart, Mayhew, & Holden, for Darlington & Sons, Wigan.*

Solicitors for respondents: *Norris, Allen, & Carter.*

STONE *v.* THE MAYOR, ALDERMEN, AND BURGESSES OF YEOVIL. 1876 *May* 22.

Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 9, 22—*Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 6, 12—*Permanent Injury to Land by the Taking of Water—Assessment of Compensation—Tenant for Life—Ultra vires.*

Sect. 9 of the Lands Clauses Consolidation Act, 1845, applies as well to the case of "permanent injury to land" in the occupation of a tenant for life as to that of "lands purchased or taken."

Under a local waterworks Act, which incorporated the Lands Clauses Consolidation Act, 1845, and the Waterworks Clauses Act, 1847, the promoters (a corporation) were impowered to take, use, divert, and appropriate certain streams, amongst others a stream necessary for the working of a mill of which the plaintiff was tenant for life. In September, 1872, they gave the plaintiff notice of their intention to divert *the whole* of the stream, and did at the same time actually divert a great portion of it, and in April, 1874, by an agreement professing to be made under the powers of the special Act, it was referred to two surveyors to determine "the amount of compensation money to be now paid by the corporation for the damage which the owner or owners for the time being of the said premises may sustain by the abstraction of the whole of the said streams, springs, and waters which the said corporation are so as aforesaid authorized to take, use, divert, and appropriate for the purposes of the said waterworks," &c. The valuers so named not agreeing, a third was appointed by two justices (under s. 9 of the Lands Clauses Consolidation Act, 1845), who awarded that "the sum of 939*l.* 5*s.* is the compensation money to be paid by the above-named corporation for the permanent damage and injury which the owner or owners for the time being of the above-mentioned mill, lands, and premises may have sustained or shall or may sustain by the abstraction of *the whole* of the streams," &c.

To a statement of claim, alleging the above facts, in an action to recover the sum so awarded, the defendants demurred, in substance, on the ground that the Waterworks Clauses Act, 1847, s. 12, empowered the defendants to divert the stream from time to time, and their liability was to make compensation from time to time:—

Held, that the valuation was good under s. 9 of the Lands Clauses Consolidation Act, 1845, and that the agreement to refer was not ultra vires; and that, the defendants having at the time of the first diversion given notice of a subsequent diversion, the valuer was right in assessing compensation for both.

Affirmed by Ct. of App. 2 C.P.D. 99. C.A.

STATEMENT OF CLAIM. 1. The plaintiff before and at the time of the agreement hereinafter mentioned was and is the owner, to wit, as tenant for life, of a certain water grist-mill and premises called Withyhook Mill, situate in the parish of Leigh, in the county of Dorset, and also was and is entitled to the use and enjoyment of certain streams, springs, and waters flowing down to the said mill, and necessary for the purpose of working the same.

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2. By the Yeovil Improvement Act, 1870 (33 & 34 Vict. c. lxxxviii), which incorporated, amongst other Acts, the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), and the Waterworks Clauses Acts, 1847 and 1863 (10 & 11 Vict. c. 17, and 26 & 27 Vict. c. 93), the defendants were authorized and impowered to construct certain waterworks for supplying water to the borough of Yeovil and to other places mentioned in the Act, and for that purpose to take, use, divert, and appropriate the several streams, springs, waters, and sources of water shewn on the plans and described in the books of reference deposited by the defendants as mentioned in the Act.

3. The streams, springs, and waters which the defendants were so impowered to divert and appropriate for the purposes of the waterworks authorized by the Act included certain streams, springs, and waters flowing down to and forming the principal supply of water to the plaintiff's mill.

4. In or about the month of September, 1872, the defendants gave notice to the plaintiff of their intention to divert and appropriate under the powers of the first-mentioned Act the whole of the last-mentioned streams, springs, and waters, and at or about the same time the defendants actually took and diverted a great portion of the said streams, springs, and waters for the purposes of the said waterworks.

5. The necessary effect of such diversion and appropriation of the said streams and waters by the defendants was, to cause permanent injury and damage to the said mill and premises of the plaintiff, and the plaintiff as such owner thereof as aforesaid then became and was entitled to have the permanent damage and injury which then had been or might thereafter be sustained by the plaintiff or the owner for the time being of the said mill and premises, by reason of the exercise by the defendants of the powers of their Act, ascertained by valuation in the manner provided by the Lands Clauses Consolidation Act, 1845.

6. A correspondence subsequently took place between the plaintiff's solicitors and the solicitor of the defendants as to the best mode of determining the amount of compensation due to the plaintiff.

7. On the 13th of April, 1874, an agreement was made between the plaintiff and the defendants, which agreement was as follows:—

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An agreement made and entered into this 13th of April, 1874, between the mayor, &c., of the borough of Yeovil (hereinafter called "the corporation"), of the one part, and Thomas Stone, of, &c., of the other part: Whereas the corporation, in pursuance of the powers and provisions of the Yeovil Improvement Act, 1870, and the several Acts and parts of Acts incorporated therewith, are for the purposes of the waterworks authorized by the first-mentioned Act impowered and intend from time to time to take, use, divert, and appropriate the streams, springs, and waters arising from and flowing through and out of the pond and pieces of land situate in the parish of Melbury Bubb, in the county of Dorset, numbered 19 and 20 as regards lands in the maps or plans and book of reference deposited with the respective clerks of the peace for the counties of Dorset and Somerset as in the first-mentioned Act is mentioned; and also the streams, springs, and waters arising from and flowing through and out of the Holywell Tunnel Gardens Embankment railway and watercourses, also situate in the same parish, numbered 1, 2, 3, 11, and 11*a*, as regards lands in that parish in the said deposited maps or plans and book of reference: And whereas the said Thomas Stone is tenant for life of a water grist-mill called Withyhook Mill and certain lands adjoining and belonging thereto situate in the parish of Leigh, in the county of Dorset, under and by virtue of the last will and testament of John Stone, deceased, is interested in all or some of the said streams, springs, and waters: Now, be it known that, in pursuance of the Lands Clauses Consolidation Act, 1845, the corporation do hereby nominate on their behalf Henry Parsons, of &c., an able practical surveyor, and the said T. Stone doth hereby nominate John Day, of &c., another able practical surveyor, to be the two surveyors who shall determine (if they can agree) the amount of compensation money to be now paid by the corporation for the damage which the owner or owners for the time being of the said premises may sustain by the abstraction of the whole of the said streams, springs, and waters which the said corporation are so as aforesaid authorized to take, use, divert, and appropriate for the purposes of the said waterworks or otherwise by reason of the execution of the powers of the first-mentioned Act.

(Seal of the corporation, and signature of T. Stone.)

8. Henry Parsons and John Day, the valuers named in the agreement, having disagreed in the valuation of the matters and things referred to them by the said agreement, one James Rawlence, an able practical surveyor, was shortly afterwards, upon the application of the defendants and with the consent of the plaintiff, duly nominated by two justices, in accordance with the provisions in that behalf of the Lands Clauses Consolidation Act, 1845, to determine the amount of compensation to be paid by the defendants to the plaintiff in respect of the said damage and injury to the said mill and premises as aforesaid.

9. James Rawlence afterwards took upon himself the burthen of such valuation accordingly, and, having been attended by the parties respectively, their respective solicitors and witnesses, duly and

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in accordance with the provisions of the Lands Clauses Consolidation Act, 1845, made his award and valuation respecting the premises, as follows:—

I, James Rawlence, the surveyor nominated by two justices in and by the nomination under their hands indorsed on the above-written agreement, do by this my valuation determine that the sum of 939*l.* 5*s.* is the compensation money to be paid by the above-named corporation for the permanent damage and injury which the owner or owners for the time being of the above-mentioned mill, lands, and premises may have sustained, or shall or may sustain, by the abstraction of the whole of the streams, springs, and waters which the said corporation are authorized to take, use, divert, and appropriate for the purposes of the waterworks authorized by the Yeovil Improvement Act, 1870, and I declare that this my valuation is correct. (signed) James Rawlence.

10. The defendants themselves took up the said award and valuation of Rawlence, but (though frequently requested by the plaintiff so to do) have not paid either to the plaintiff or into the Bank, pursuant to the directions of the Lands Clauses Consolidation Act, 1845, the amount of the valuation; but, on the pretext of the valuation and award being ultra vires or otherwise invalid, have constantly neglected and refused so to do.

The plaintiff claimed 939*l.* 5*s.* and interest thereon from the 18th of July, 1874, until judgment, and a writ of mandamus directing the defendants to pay the above amount and interest into the Bank, pursuant to the provisions of the Lands Clauses Consolidation Act, 1845.

Demurrer to the plaintiff's statement of claim,—that the same is bad in law on the ground, amongst others, that it does not appear that the plaintiff, as such limited owner as in the statement of claim mentioned, could or did ever agree to sell and convey, or that the defendants under the powers therein mentioned could or did ever agree to purchase, take, use, divert, and appropriate the whole of the streams, springs, and waters mentioned in the third paragraph of the said statement of claim, or the whole of any of them. Joinder.

May 18. *Kingdon, Q.C.* (*H. C. Batten,* with him), in support of the demurrer. The question is whether the defendants, who have diverted and appropriated only a portion of the water to which their notice applied,—that having been found sufficient for their present purposes,—are bound to pay for the whole. In entering

into this agreement for a reference or valuation, the defendants were misled by a decision of Sir J. Romilly, M.R., in *Ferrand* v. *Corporation of Bradford*. (1) That decision having been since overruled by a judgment of the present Master of the Rolls in *Bush* v. *Trowbridge Waterworks Co.* (2), which judgment was confirmed by the Court of Appeal (3), they have now ascertained that their proper course would have been to get the plaintiff's compensation assessed for so much only of the water as they had actually appropriated. If that agreement and the assessment thereon be upheld, the consequence will be that the plaintiff, who is only tenant for life of the mill in question, will get the price of the whole stream. The Lands Clauses Consolidation Act, 1845, and the Waterworks Clauses Act, 1847, are incorporated with the special Act. The material clauses of those Acts are the 9th, 22nd, and 68th of the former, and the 6th and 12th of the latter. (4) Under these the defendants had power to take all or

(1) 21 Beav. 412. 2 Jur. N.S. 175.

(2) Law Rep. 19 Eq. 291.

(3) Law Rep. 10 Ch. 459.

(4) Sect. 9 of 8 & 9 Vict. c. 18, enacts that "the purchase-money or compensation to be paid for any lands to be purchased or taken from any party under any disability or incapacity, and not having power to sell or convey such lands except under the provisions of this or the special Act, and the compensation to be paid for any permanent damage or injury to any such lands, shall not, except where the same shall have been determined by the verdict of a jury, or by arbitration, or by the valuation of a surveyor appointed by two justices under the provision hereinafter contained, be less than shall be determined by the valuation of two able practical surveyors, one of whom shall be nominated by the promoters of the undertaking, and the other by the other party, and, if such two surveyors cannot agree in the valuation, then by such third surveyor as any two justices shall upon application of either party, after notice to the other party, for that purpose nominate," &c.

Sect. 22 enacts that, "if no agreement be come to between the promoters of the undertaking and the owners of or parties by this Act enabled to sell and convey or release any lands taken or required for or injuriously affected by the execution of the undertaking, or any interest in such lands, as to the value of such lands or of any interest therein, or as to the compensation to be made in respect thereof, and if in any such case the compensation claimed shall not exceed 50*l*., the same shall be settled by two justices." If exceeding 50*l*., to be settled by arbitration or by the verdict of a jury: s. 23.

And s. 68 enacts that, "if any party shall be entitled to any compensation in respect of any lands, or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act or any Act incorporated therewith, and it

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any part of the waters of the streams in question from time to time, paying compensation to the owners for what they may take or injuriously affect. The parties here have assumed to refer the amount of compensation under s. 9 of 8 & 9 Vict. c. 18. That section, however, applies only to lands "purchased or taken," and not to the case of lands "injuriously affected,"—the words "the compensation to be paid for any permanent damage or injury to any *such* lands," obviously referring to the lands mentioned in the earlier part of the clause.

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the compensation claimed in such case shall exceed the sum of 50*l.*, such party may have the same settled by arbitration, or by the verdict of a jury as he shall think fit; and, if such party desire to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice the nature of the interest in such lands in respect of which he claims compensation and the amount of the compensation so claimed therein; and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose within twenty-one days after the receipt of any such notice from any party so entitled, the same shall be settled by arbitration in the manner herein provided." The section then goes on to provide for the mode of settling compensation by a jury.

The 6th section of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), enacts that, "Where by the special Act the undertakers shall be impowered, for the purpose of constructing or supplying waterworks, to take or use any lands or streams otherwise than with the consent of the owners and occupiers thereof, they shall, in exercising the powers so given to them, be subject to the provisions and restrictions contained in this Act, and, if the lands be situated in England or Ireland, to the provisions and restrictions contained in the Lands Clauses Consolidation Act, 1845, and shall make to the owners and occupiers of, and all the parties interested in, any lands or streams taken or used for the purpose of the special Act, or injuriously affected by the construction or maintenance of the works thereby authorized, or otherwise by the execution of the powers thereby conferred, full compensation," to be ascertained in the manner provided by the Lands Clauses Consolidation Act, 1845.

And s. 12 enacts that, subject to the provisions and restrictions in this and the special Act and any Act incorporated therewith, the undertakers may, amongst other things, "from time to time divert and impound the water from the streams mentioned for that purpose in the special Act or the plans or books of reference, and alter the course of any such streams, not being navigable, and also take such waters as may be found in and under or on the lands to be taken for constructing the works: Provided always that, in the exercise of the said powers, the undertakers shall do as little damage as can be, &c., and shall make full compensation to all parties interested for all damages sustained by them through the exercise of such powers."

[BRETT, J. There is nothing on the face of the statement of claim to shew that the proceedings are not under s. 68 of the Lands Clauses Consolidation Act, 1845, or the 12th section of 10 & 11 Vict. c. 17.]

The defendants being a corporation having limited powers conferred upon them by their special Act, if they have entered into an agreement which is ultra vires, as this agreement clearly is, the rate-payers are not bound by it: *Ashbury Railway Carriage and Insurance Co.* v. *Riche.* (1)

[BRETT, J. The question is whether they may not agree to pay for damage which they are presently about to commit.]

The Acts of Parliament give them no power to do so.

May 22. *Pinder* (*Lopes, Q.C.*, with him,) contrà. Since the decision of the Court of Appeal in *Bush* v. *Trowbridge Waterworks Co.* (2), it must be assumed that this is an injurious affecting of the plaintiffs' interest in land, within s. 68 of the Lands Clauses Consolidation Act, 1845, with which s. 22 is to be read as completing the scheme of compensation. Under that section it is competent to the parties to agree as to the compensation to be paid, as well for lands taken as for permanent injury to lands, in any way they may think fit: it is only in the event of their disagreeing that the compensation is to be assessed by an arbitrator or by the verdict of a jury. This is not strictly an arbitration or a valuation under the provisions of the Acts referred to or either of them, but an agreement to submit to an award or valuation upon the terms of the Lands Clauses Consolidation Act, 1845, so far as they may be applicable. The parties here have consented to adopt the machinery of s. 9 so far as regards the assessment of value. The agreement recites that the defendants had given notice of their intention to take, and intended to take, the whole of the streams: the umpire, therefore, under the circumstances, was justified in assessing the value of the whole once for all; for, there could not be a second assessment or valuation: *Brogden* v. *Llynvi Valley Railway Co.* (3); *Croft* v. *London and North Western Ry.*

(1) Law Rep. 7 H. L. 653.
(2) Law Rep. 10 Ch. 459.
(3) 9 C. B. (N.S.) 229; 30 L. J. (C.P.) 61.

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Co. (1); *Collins* v. *South Staffordshire Ry. Co.* (2); *Martin* v. *Leicester Waterworks Co.* (3) Assuming that there has been some irregularity, the defendants cannot object to the jurisdiction of the umpire, after having appeared before him and taken up his award: *Andrews* v. *Elliott* (4); *Tyerman* v. *Smith.* (5) The language of s. 9 of the Lands Clauses Consolidation Act, 1845, will be insensible if the words "such lands" are to be construed as meaning only lands purchased or taken; whereas, it will be consistent and clear if "such" be rejected. Upon the whole, therefore, the assessment was good as a valuation under s. 9; and s. 22 shews that this was such an agreement as was contemplated by the Act.

Kingdon, Q.C., in reply. It is clear that both parties intended when the notice was given to act under the 9th section of the Lands Clauses Consolidation Act, 1845, and did so act as far as they could; and it is equally clear that the one party had a right to take and the other to sell the whole of the stream, if the decision of the Master of the Rolls in *Ferrand* v. *Corporation of Bradford* (6) was right. It is now, however, settled that the water is to be paid for from time to time as the necessity for taking it may arise. But, whether it be a valuation under s. 9 or an arbitration under s. 22 aided by other sections of the Act, it is also clear that the defendants are only compellable to pay for so much of the streams as were from time to time required by them,—in other words, that they are bound under the provisions of the Waterworks Clauses Act, 1847, to pay compensation for injury *sustained*, and not for future possible damage or injury: *Caledonian Ry. Co.* v. *Lockhart.* (7) Whatever they have done in excess of their powers is null and void.

BRETT, J. In this case the statement of claim is founded on the fact that the plaintiff is tenant for life of a mill, and is also entitled to the use and enjoyment of certain streams, springs, and

(1) 3 B. & S. 436; 32 L. J. (Q.B.) 113. 9 Jur. N.S. 962.
(2) 7 Ex. 5; 21 L. J. (Ex.) 247.
(3) 3 H. & N. 463; 27 L. J. (Ex.) 432.
(4) 5 E. & B. 502; 25 L. J. (Q.B.) 1; affirmed on error, 6 E. & B. 338; 25 L. J. (Q.B.) 336. 1 Jur. N.S. 1046.
(5) 6 E. & B. 719; 25 L. J. (Q.B.) 350. 2 Jur. N.S. 880.
(6) 21 Beav. 412; 25 L. J. (Ch.) 389.
(7) 3 Macq. 808.

(6 S.C. 2 Jur. N.S. 175.

waters flowing down to the same, and necessary for the purpose of working it, and that, he being so possessed and entitled, the defendants, under the powers conferred upon them by a local Act which incorporated the Lands Clauses Consolidation Act, 1845, and the Waterworks Clauses Acts, 1847 and 1863, gave the plaintiff notice of their intention to divert and appropriate certain streams which do not belong to the plaintiff, but as to which he has a mill-owner's rights; and the remedy claimed is that which is applicable to the case of a tenant for life, viz. a writ of mandamus directing the defendants to pay into the bank the sum which is assessed by the award of a valuer appointed by two justices under the Lands Clauses Consolidation Act, 1845, with interest thereon. There is a demurrer to that statement of claim, on the ground that it does not appear that the plaintiff as such limited owner as in the statement of claim mentioned could or did ever agree to sell and convey, or that the defendants under the powers therein mentioned could or did ever agree to purchase, take, use, divert, and appropriate the whole of the streams, springs, and waters mentioned in the third paragraph of the statement of claim or the whole of any of them; and therefore for the purposes of the day all the allegations therein must be assumed to be true.

The plaintiff argues that the submission to assessment and the assessment have taken place under and according to s. 9 of the Lands Clauses Consolidation Act, 1845, or, if not, then under s. 22, and that, in either case, the assessment is binding upon both the plaintiff and the defendants. The defendants, on the other hand, have argued that this submission to assessment, and the assessment made under it, are not within s. 9, and, if not valid under s. 9, are not within s. 22, and therefore cannot properly be said to have been made under the Lands Clauses Consolidation Act at all, and neither the plaintiff nor the defendants can be bound thereby. They further contend that the provisions of the Lands Clauses Consolidation Act are not applicable to a considerable portion of the matter in question, viz. a future diversion; and that, if they have agreed to submit a matter for assessment which the plaintiff was not entitled to have assessed at the time, the submission was ultra vires. It was further urged, that, whatever be the true meaning of the Lands Clauses Consolidation Act, 1845, the

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Waterworks Clauses Act, 1847, did not authorize the corporation to bind the rate-payers by an assessment of compensation for a claim or damage which had not arisen at the time of assessment.

The first question therefore is, whether the submission and assessment are under the Lands Clauses Consolidation Act, which is incorporated in the special Act under which the defendants acted in diverting the waters in question. I think s. 22 of the Lands Clauses Consolidation Act, 1845, does not give any power to refer at all: the agreement there mentioned is an agreement as to value, not an agreement to refer: but, be that as it may, such an agreement would not bind the remainder-man, who is no party to it, and who cannot be bound by the decision of a person who is not named by himself, unless invested by the Act with power to bind him. It follows, therefore, that, if there is to be an arbitration to assess the amount to be paid for compensation, it should be carried out by persons acting under the statute. If the two arbitrators do not agree, the only person who could have power to bind the remainder-man is the umpire to be named by them. Now, here it appears that the delegation was not to an umpire, but to a valuer nominated by two justices. If, therefore, this is to be considered as an arbitration under s. 22 of the Lands Clauses Consolidation Act, I think it would not be binding. The question then must be whether it is to be regarded as a valuation under s. 9. If so, I think it is binding.

It is contended on the part of the defendants that this is not a matter within s. 9, because the compensation is sought for an injury by diverting water, which is to be considered as an injurious affecting of land, whereas s. 9 applies only to the taking of land. Now, the question whether the diversion of a stream of water is a taking of property or merely an injuriously affecting it is one which seems to have been decided by judicial authority. In *Ferrand* v. *Corporation of Bradford* (1), Lord Romilly, M.R., speaking of s. 12 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), says: "This clause expressly makes the same distinction with respect to the streams which the Lands Clauses Consolidation Act does with respect to lands, that is to say, if you take

(1) 21 Beav. 412, 419; 25 L. J. (Ch.) 389.

the stream, you must pay the whole price of it; if you injuriously affect the stream, then that clause does not apply. But, when you have injuriously affected the stream, compensation in damages must be made in accordance with the ordinary mode." The present Master of the Rolls, however, in *Bush* v. *Trowbridge Waterworks Co.* (1), came to a contrary conclusion: and his decision was affirmed on appeal. (2) I must confess that, if I had to decide this question for myself, I should have decided it as the present Master of the Rolls did. I think, therefore, we must treat this as property of the plaintiff which is sought to be injuriously affected by the defendants. The question then arises whether that can be the subject of a valuation under s. 9 of the Lands Clauses Consolidation Act, 1845. That section enacts that "the purchase-money or compensation to be paid for any lands to be purchased or taken from any party under any disability or incapacity, and not having power to sell or convey such land, except under the provisions of this or the special Act, and the compensation to be paid for any permanent damage or injury to any *such* lands, shall not, except where the same shall have been determined by the verdict of a jury, or by arbitration, or by the valuation of a surveyor appointed by two justices under the provisions hereinafter contained, be less than shall be determined by the valuation of two able practical surveyors, one of whom shall be nominated by the promoters of the undertaking and the other by the other party, and if such two surveyors cannot agree in the valuation, then by such third surveyor as any two justices shall upon the application of either party, after notice to the other, for that purpose nominate." The word "such" in the second branch of that clause would seem at first sight to apply to lands purchased or taken; but, if so read, it is insensible. It is a canon of construction that, if it be possible, effect must be given to every word of an Act of Parliament or other document; but that, if there be a word or a phrase therein to which no sensible meaning can be given, it must be eliminated. It seems to me, therefore, that the word "such" must be eliminated from this part of the clause. The subjects dealt with by s. 9 therefore are, compensation in respect of lands taken and

(1) Law Rep. 19 Eq. 291. (2) Law Rep. 10 Ch. 459.

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compensation in respect of lands injuriously affected: if so, a claim for compensation for permanent injury is within that section, in respect of which a valuation may take place.

But it is said that the assessment in this case is wrong, because the umpire has assessed the amount of compensation due not only for the diversion of part of the water from the stream in question, which has already taken place, but also for a diversion of the water which has not taken place. As to that, the statement of claim is that the defendants were impowered to divert and appropriate the several streams, &c., shewn and described on the plans and books of reference, which included the streams forming the principal supply of water to the plaintiff's mill, that is, all the streams in respect of which compensation was claimed,—so that the claim is not in respect of water which the defendants had no power to divert. The fourth paragraph of the statement of claim goes on to state that, in September, 1872, "the defendants gave notice to the plaintiff of their intention to divert and appropriate under the powers of the special Act the whole of the last-mentioned streams, springs, and waters, and at or about the same time the defendants actually took and diverted a great portion of the said streams, &c., for the purposes of the waterworks." I do not so much rely upon that as I do upon what comes after. In the agreement or submission it is recited that the corporation are impowered and *intend* from time to time to take, use, divert, and appropriate the streams, springs, and waters therein mentioned, in all or some of which the plaintiff as tenant for life of Withyhook Mill is interested. Therefore, at the moment of the submission the defendants say that they are about to divert the whole of the water. We must assume from that statement that their intention is shortly to take the whole: and yet it is said that the valuers, having notice of that intention, are not entitled to assess the value of that prospective taking. It seems to me that it would be almost insensible to say that, with notice that the corporation intended to take part of the water in May and the rest in June, there must be one assessment of compensation in May and another in June: yet that is the contention on the part of the defendants. Where diversions of water take place from time to time, there may no doubt be separate assessments. But it does not follow

that if at the time of the first diversion notice is given that there is to be a subsequent diversion, there is anything to prevent the valuers from assessing compensation for both.

The 12th section of the Waterworks Clauses Act, 1847, has been relied on. It enacts that, subject to the provisions and restrictions in that and the special Act and any Act incorporated therewith, the undertakers may, amongst other things, "from time to time divert and impound the water from the streams mentioned for that purpose in the special Act or the plans or books of reference, and alter the course of any such streams, not being navigable, and also take such waters as may be found in and under or on the lands to be taken for constructing the works: provided always, that, in the exercise of the said powers, the undertakers shall do as little damage as can be, &c., and shall make full compensation to all parties interested for all damages sustained by them through the exercise of such powers." It is said that that provides only for an assessment of compensation for damage which has actually taken place: but, according to the common and ordinary interpretation of language, it may be read "sustained or to be sustained;" and that I think is its meaning here. I am therefore of opinion that the parties had a right to refer to valuation according to s. 9 of the Companies Clauses Consolidation Act, 1845, not only the compensation due for a diversion which had already taken place, but also for that which was about to take place; and that the valuers or umpire had power to decide as to both.

The case in the House of Lords, *Caledonian Ry. Co.* v. *Lockhart* (1), which was cited as an authority to the contrary, seems to me only to shew that where there are successive diversions there may be successive valuations: but it does not shew that there may not be one assessment of compensation for all diversions of which notice has been given. It seems to me, therefore, that the present case is brought within s. 9 of the Lands Clauses Consolidation Act, 1845, and that the plaintiff's claim for compensation is not invalidated by s. 12 of the Waterworks Clauses Consolidation Act, 1847.

Upon the whole I have come to the conclusion that the assess-

(1) 3 Macq. 808.

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ment of compensation was strictly within the statute, and that the agreement entered into by the corporation was not ultra vires, and consequently that the statement of claim must be held good and the demurrer be overruled.

ARCHIBALD, J. In his statement of claim the plaintiff avers that he was tenant for life of a water grist-mill and entitled to the use and enjoyment of certain streams, and that the defendants, who under the provisions of a special Act had power so to do, gave the plaintiff notice of their intention to divert the whole of those streams, and had actually diverted a large portion thereof, causing permanent injury to the plaintiff's mill and premises. It then sets out an agreement under which two surveyors were appointed to determine the amount of compensation money "to be now paid" by the corporation for the damage which the owner of the premises might sustain by the abstraction of the whole of the said streams, &c., which the corporation were authorized to take, use, divert, and appropriate for the use of the waterworks. It then proceeds to aver that, the valuers named in the agreement having disagreed in the valuation of the matters referred to them, one Rawlence, an able practical surveyor, was duly nominated by two justices, in accordance with the provisions in that behalf of the Lands Clauses Consolidation Act, 1845, "to determine the amount of compensation to be paid by the defendants to the plaintiff in respect of the said damage and injury to the said mill and premises as aforesaid." It then alleges that Rawlence by his award and valuation determined that the sum of 939*l.* 5*s.* was the compensation money to be paid by the corporation for the permanent damage and injury which the owner or owners for the time being of the mill and premises may have sustained or shall or may sustain by the abstraction of the whole of the streams, &c., which the corporation were authorized to take, use, divert, and appropriate for the purposes of the waterworks authorized by the special Act. To this there is a demurrer, substantially on the ground that s. 12 of the Waterworks Clauses Act, 1847, impowers the promoters to divert the streams from time to time, and renders them liable to make compensation from time to time. The question then arises whether the agreement set out in the statement of claim was a reference to

arbitration under s. 68 of the Lands Clauses Consolidation Act, 1845, or a valuation under s. 9, which directs that the amount of compensation in the case of persons under disability shall be ascertained by the valuation of two surveyors, and paid into the Bank of England. Now, both the Lands Clauses Consolidation Act, 1845, and the Waterworks Clauses Act, 1847, are incorporated in the special Act under consideration: and the question which arises upon s. 9 of the former Act is whether its provisions are confined to "lands purchased or taken," or extend also to the case of "lands injuriously affected." It has been pointed out in argument that the words of that section are larger than any language necessary for the case of a compulsory purchase of land, and that this shews that it was meant to include the case of permanent injury to lands not taken. It seems to me that that argument must prevail. The only objection that can be urged against that construction of the section arises from the use of the word "such." But I agree with my Brother Brett that it is a true canon of construction, that, where a word is found in a statute or in any other instrument or document which cannot possibly have a sensible meaning, we not only may, but must, eliminate it in order that the intention may be carried out. Rejecting that word, the clause will read thus,—"The purchase-money or compensation to be paid for any lands to be purchased or taken from any party under any disability or incapacity, and not having power to sell or convey such lands except under the provisions of this or the special Act, *and the compensation to be paid for any permanent damage or injury to any lands,* shall not, except," &c. And that I conceive to be the real sense and meaning of the section, and applies it to cases of compensation for lands taken and for lands injuriously affected, in the same manner as under s. 68. The parties here have agreed to refer the question of compensation to valuers, and the valuers appointed by them having failed to agree, a third was appointed by two justices in the terms of the Act, and he has awarded a certain sum by way of compensation. This gives the plaintiff all he can require, provided there be nothing in the argument founded upon the Waterworks Clauses Act, 1847, that the agreement was ultra vires. The 12th section of

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that Act impowers the promoters to take the whole of the water. It is alleged in the statement of claim, and the agreement recites, that the defendants had given the plaintiff notice that they "intend to take, use, divert, and appropriate" the whole. The obvious meaning of that is that they intend to take it at once or shortly,—in a few days or weeks; and therefore the amount of compensation due in respect of permanent injury to the plaintiff's mill and premises by taking the whole was properly submitted to the valuers or umpire, and he or they were entitled to ascertain and determine the amount due as compensation for taking the whole. It follows, therefore, that the plaintiff is entitled to judgment upon this demurrer, and to a mandamus to compel the defendants to pay the money into the Bank.

I desire not to pledge myself as to whether this may not be a good reference under s. 22 of the Lands Clauses Consolidation Act, 1845; for, though I think it possible there may under such circumstances be a submission to arbitration under that section, inasmuch as its words may be read as including the case of a person under disability, I think it is unnecessary to decide that. It is enough to say that this is a good reference or valuation under s. 9.

Judgment for the plaintiff.

Solicitors for plaintiff: *Warry, Robins, & Burges, for Thomas Ffooks, Shelborne.*

Solicitors for defendants: *Wedlake & Letts, for W. H. Batten, Yeovil.*

THE CROYDON COMMERCIAL GAS COMPANY *v.* DICKINSON AND OTHERS. 1876 *May* 31.

Principal and Surety—Discharge of Surety by Time given to Principal—Contract for Performance at several distinct Times.

Although where one enters into a bond as surety for the performance by another of two things which are separate and distinct, a subsequent alteration of the principal's contract as to one of them without the surety's consent does not release the surety from his contract of suretyship as to the other, yet, where the contract is one entire contract for the performance by the principal of two or more things at different times, if by any dealing with the principal without the consent of the surety the latter is discharged as to one of them, his liability as surety is altogether released.

When once a surety is relieved from the obligation which he has undertaken, that obligation cannot be renewed by any subsequent act to which he is no party.

D. contracted with a gas company to take from them tar and ammoniacal liquor, and to pay for each month's supply within the first fourteen days of the ensuing month after the account rendered, "unless the company should by writing signed by their secretary allow a longer time for payment." The defendant became surety for the performance of the contract by D.

On the 3rd of August an account was delivered for the July supply; and after the fourteen days had expired, viz. on the 21st, the secretary of the company, without the knowledge of the surety, sent D. a letter inclosing a promissory note at a month for the amount, with a request that he would sign and return it. D. signed the promissory note and returned it to the secretary, who kept it:—

Held, that, assuming this to be a giving of time "by writing signed by the secretary," within the meaning of the agreement, being after breach the surety was released; and that, once released, he was not liable in respect of debts contracted in respect of subsequent months' supplies.

Affirmed 2 C.P.D. 46 C.A.

ACTION against Dickinson as principal, and Pollard & Child as sureties, on a bond.

Statement of claim. 1. The defendants, by their bond dated the 20th of January, 1874, became bound to the plaintiffs in 250*l.* to be paid by the defendants to the plaintiffs.

2. The bond was and is subject to a condition thereunder written, whereby, after reciting that A. J. Dickinson had that day entered into an agreement with the plaintiffs respecting the purchase of tar and ammoniacal liquor and the punctual removal thereof as therein mentioned and the payment for the same as therein also particularly mentioned, and with a penalty therein specified of 100*l.* for every breach of the said agreement to remove the said

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tar and ammoniacal liquor as therein also mentioned, it was conditioned that if the said A. J. Dickinson well and truly performed the said agreement in all things, and made good all the payments due from him under or by virtue thereof, then the bond should be void, but otherwise it should remain in full force.

3. The said A. J. Dickinson did not make good payments of moneys amounting to 234*l.* 11*s.* 1*d.*, which became owing and are due from him under and by virtue of the said agreement, being for and in respect of tar and ammoniacal liquor purchased of the plaintiffs and had by the said A. J. Dickinson under and by virtue of the said agreement between the 20th of January, 1874, and the 30th of September, 1875, accounts whereof have been from time to time rendered to him.

4. The said 234*l.* 11*s.* 1*d.* is due and owing to the plaintiffs.

The plaintiffs claim 234*l.* 11*s.* 1*d.*

The defendant Dickinson pleaded a composition under the liquidation clauses of the Bankruptcy Act, 1869, 32 & 33 Vict. c. 71, ss. 125, 126.

Statement of defence by Pollard :—

1. The defendant admits the statement of facts in the first and second paragraphs of the plaintiffs' statement of claim.

2. The defendant says that the said agreement was as follows :—

Memorandum of an agreement made this 20th of January, 1874, between the Croydon Commercial Gas and Coke Company, hereinafter called "The Company," of the one part, and A. J. Dickinson, of Trundley Lane, Deptford, in the county of Kent, manufacturing chemist, of the other part.

1st. That the company shall sell and Dickinson shall buy all the surplus tar made at the company's works at Waddon, in the parish of Croydon, in the county of Surrey, between the 1st of October, 1873, and the 1st of October, 1875, and which the company shall have to dispose of for distilling purposes, at the price of 1½*d.* per gallon (except 50,000 gallons more or less of tar agreed to be sold to Grindley & Co.).

2ndly. That the company shall sell and Dickinson shall buy all the ammoniacal liquor made at the company's works at Waddon (except 100,000 gallons more or less agreed to be sold to Messrs. M'Dougall), and that the price shall be 2*l.* for every 1000 gallons of ten-ounce strength, with the addition of 4*s.* 6*d.* per ounce per 1000 gallons for every additional ounce in strength above ten ounces per gallon strength, and so in proportion for any less quantity of any of the strengths above alluded to.

3rdly. Dickinson agrees to provide proper tanks and receptacles, and to remove the said tar and ammoniacal liquor at such days and times as may be

required by the company by notice in writing signed by their secretary, with at least three clear days' notice; such writing to be given to Dickinson or sent by post to the address above mentioned, or to any other residence or place of business that he may use for the time being.

4thly. Dickinson agrees that if he shall fail to remove all the tar and ammoniacal liquor, or either of them, as required to be removed by the company by such notice or notices as aforesaid, he will pay to the company the sum of 100*l.* as liquidated damages for every breach of his agreement to remove the same as aforesaid: And it is further agreed that if at any time or times the company shall find from their manager that the tar or ammoniacal liquor at their works is likely to overflow the tanks, they shall be at liberty to prevent such overflow by selling off either tar or ammoniacal liquor to any other person or persons, whether chemical manufacturers or otherwise, and that such sale or sales shall not be considered a breach of this agreement.

5thly. Dickinson agrees that the account of tar and ammoniacal liquor had by him shall be estimated on the last day of every calendar month, and the payment for the same shall be made within the first fourteen days of the ensuing month after every estimate shall be so made, unless the company shall, by writing signed by their secretary, allow a longer time for payment, and the first monthly estimate shall be made on the 1st of February next.

6thly. That, if the said A. J. Dickinson, his executors, administrators, or assigns, shall make any breach or non-performance of any of the clauses of this agreement, it shall be lawful thereupon, or at any time afterwards, notwithstanding any subsequent payment or receipt or settlement of accounts, for the company to determine this agreement by giving or leaving seven days' notice in writing, signed by their secretary, of their intention to determine the same; such notice to be given or sent as hereinbefore required with respect to the notices before mentioned.

Lastly. This agreement shall bind the executors and administrators of Dickinson as effectually as if those words of representation were used after his name throughout. Witness the hand of the secretary of the company by order and on behalf of the company, and the hand of the said John Arthur Dickinson.

(Signed by Russell, the secretary, and by Dickinson.)

and that the account of tar and ammoniacal liquor was not estimated as in and by the agreement prescribed, and although the said company did not at any time by writing signed by their secretary allow a longer time for payment, as provided by the agreement.

3. The defendant says that the plaintiffs did not deal with Dickinson on the terms of the agreement between them and Dickinson; but, without the knowledge and consent of the defendant, dealt with him in a wholly different manner and on wholly different terms, and so as to prejudice the defendant thereby, and gave time for payment to Dickinson of moneys due under the agreement in a binding manner and by contract founded on

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sufficient consideration without the knowledge or consent of the defendant, and beyond the time prescribed by the agreement.

4. The defendant does not admit the allegations of fact in the plaintiffs' third and fourth paragraphs contained.

The statement of defence delivered on behalf of Child was in all respects the same as Pollard's.

Reply. 1. The plaintiffs admit that the agreement was as set forth in the second paragraph of Pollard's statement of defence. 2. They join issue upon the residue of that statement.

The cause was tried before Denman, J., at the last Hilary sittings for Middlesex. The action as against Dickinson was discontinued, and as against Child withdrawn with the consent of Pollard. The facts were as follows:—Dickinson, a manufacturing chemist at Deptford, had been in the habit of purchasing from the plaintiffs tar and ammoniacal liquor; and in January, 1874, the agreement mentioned in Pollard's statement of defence was entered into between them. The course of business was as follows,—The amount due for the products supplied to Dickinson was ascertained at the end of each month, and an account sent in to Dickinson to be paid within fourteen days. The account for July, 1875, was made up and forwarded to Dickinson about the 3rd of August (which was as soon as reasonably could be). The amount was 215*l.* 16*s.* 8*d.*, of which 100*l.* was afterwards paid, leaving a balance of 115*l.* 16*s.* 8*d.*

Russell, the secretary of the company, who was called as a witness, stated that, on the 21st of August, 1875, he sent a note signed by himself to Dickinson, inclosing a promissory note for 115*l.* 16*s.* 8*d.*, payable at a month, which he requested Dickinson to sign and return to him. This Dickinson did; but the note was dishonored at maturity. Russell further proved that the amounts remaining unpaid were as follows:—Down to the end of July, 1875, 115*l.* 16*s.* 8*d.*; additional down to the end of August, 49*l.* 11*s.* 9*d.*; and to the end of September a further sum of 69*l.* 1*s.* 2*d.*

Upon cross-examination, the witness was asked,—"What passed between you and Pollard as to the mode in which Dickinson was paying under his former contract at the time the bond was executed?" The question was objected to, but was allowed,

subject to the objection. The answer was,—"He said, 'How are you going on with Dickinson in the matter of payment?' I said, 'I am taking a note at a month.' He said, 'Oh! very well.' It was after the bond was executed."

The defendant Pollard admitted that no time was specifically given as to the August and September accounts; but contended that there had been a systematic giving of time from first to last; that "payment" meant payment in cash; that the sureties were entitled to a strict performance of the contract; that there was no consent by Pollard to the course adopted; and that, as regarded the July account, the letter of the 21st of August was not time given by the company, by writing signed by their secretary, within the meaning of the agreement.

For the plaintiffs it was insisted that there had been no departure from the true intention of the agreement, and that, as to the July account, the letter of the secretary was a writing signed by him within the fifth paragraph of the agreement.

The learned judge left it to the jury to say whether Pollard knew and consented that the monthly payments should be made as they were, and whether the plaintiffs were acting under the contract in taking payment by promissory notes.

The jury answered both questions in the negative; and judgment was thereupon entered for Pollard, leave being reserved to the plaintiffs to move to enter judgment for them for 115*l.* 16*s.* 8*d.*, or for 118*l.* 12*s.* 11*d.*, or for both, as against Pollard, as the Court might hold them entitled.

Walpole and *Grantham* moved accordingly. The course of business as between the plaintiffs and Dickinson was to send at the end of each month an account of the supply of products, and to take a promissory note for the amount payable at a month; and this was known to the sureties. The 5th article of the agreement between the company and Dickinson, upon which the question turns, provides that each month's account shall be paid within the first fourteen days of the ensuing month after the estimate shall be made, "unless the company shall by writing signed by their secretary allow a longer time for payment." This clause has been strictly acted upon. As to the July account, the letter of the 21st

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of August was a sufficient giving of time by the company by writing signed by the secretary.

[BRETT, J. That was an extension of the time of payment after the money had become due and the liability had attached.]

Whether it was before or after the fourteen days makes no difference. But, at all events, as to 118*l.* 12*s.* 11*d.*, for the August and September supplies, no time was given. The sureties are clearly liable for those.

[BRETT, J. Unless they were absolved for ever, by reason of time having once been given in a manner not authorized by the agreement.]

In *Skillett* v. *Fletcher* (1), to an action on a bond conditioned for the due performance by A. of his duties as collector of the poor-rates and of the sewer rates of the parish of St. A., the bond to continue in force if A. held either office separately, with a breach, that A. received money in both capacities, and failed to pay it once, the defendant (a surety) pleaded that before breach an Act was passed increasing A.'s duties as collector of sewer rates, and under which he was also appointed collector of main drainage rates by the persons under whom he held his other appointments, —and it was held on demurrer on the ground that the bond was divisible, and that the plea afforded no answer to the defendant's liability for A.'s breach of duty as collector of poor-rates. *Harrison* v. *Seymour* (2) is an authority to the same effect.

A. L. Smith (*Macdonald* and *Grane* with him), shewed cause. Here was a binding contract on the 21st of August to give time to Dickinson. The contract in respect of which the defendant consented to be surety was that each month's supply of products should be paid for within fourteen days after the account rendered, unless the company should by writing signed by their secretary allow a longer time for payment. Assuming, but not admitting, that the secretary's letter of the 21st of August was a "writing signed by him" within the meaning of that condition, it was too late, being after the expiration of the fourteen days. The letter itself gave no time: time was given only when the secretary accepted the promissory note and retained it. That disposes of the 115*l.* 16*s.* 8*d.* Then, as to the August and September ac-

(1) Law Rep. 1 C. P. 217. (2) Law Rep. 1 C. P. 518.

12 Jur. N.S. 295.

counts, *Eyre* v. *Bartrop* (1), cited in Tudor's Leading Cases, 901, is a distinct authority to shew that the sureties being once discharged from their liability upon the contract, they are absolved altogether.

Grantham was heard in reply.

BRETT, J. I think the defendant is entitled to retain his judgment, and that this rule should be discharged. The plaintiffs sue him as surety on a bond given to secure the fulfilment by one Dickinson of an agreement entered into between Dickinson and the Croydon Gas Company. The answer set up by the defendant is, that he is absolved from liability as surety on the bond by reason of the plaintiffs having altered to his detriment their position with regard to Dickinson by giving him time. The reply to that on the part of the plaintiffs is, that, if time has been given, it was given in accordance with the terms of their contract with Dickinson; and, further, that, if the defendant is absolved in respect of the 115*l.* 16*s.* 8*d*, the balance of the July account, by reason of what occurred on the 21st of August, yet he is not absolved in respect of the 118*l.* 12*s.* 11*d.*, the amount of the August and September supplies, and that the plaintiffs are at all events entitled to recover the latter sum.

Taking into account the secretary's letter of the 21st of August and the promissory note inclosed, which was signed by Dickinson and given back to and held by the company, it seems to me that time was given to Dickinson by the acceptance from him of a promissory note, and that the company did thereby "by writing signed by their secretary allow a longer time for payment" than the time stipulated for. But, although that is so, I think it was not the allowing of time contemplated by the 5th article of the agreement of the 20th of January, 1874, because the time allowed, though by writing, was allowed after the expiration of the first fourteen days of the month. I agree that this contract is to be construed as between Dickinson and the Gas Company, and as if the question arose immediately after its execution. But I cannot agree that the meaning of it is clear. We are bound to look at a business document so as to ascertain what is its business meaning.

(1) 3 Madd. 221.

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Now, the 5th article of this agreement is to fix the time at which Dickinson is to be liable for the non-payment of what shall become due from him under his contract, or the amount of credit to be given to him. When you fix that, you fix the time at which the liability of the sureties is to attach for his default. The first moment of time at which Dickinson was to be liable for non-payment of the amount of the previous month's supply was "within the first fourteen days of the ensuing month after the estimate shall be made." If something be done in the meantime, viz. an extension of the period of credit by a writing signed by the secretary, the time may be enlarged: but, unless that is done, the liability of the surety is to attach upon non-payment by the principal in fourteen days after the account rendered. If once the liability attaches, you cannot afterwards fix a time at which the principal shall become liable. The time can only be altered in one way, viz. by writing signed by the secretary; and that must be before the fourteen days have run out, otherwise there will be two periods of time for the liability to attach. It seems to me that, although this might be an allowance of time within the meaning of the 5th article of the agreement, the allowance was too late, and not authorized by the agreement as between Dickinson and the plaintiffs. That being so, the taking of the promissory note was a giving of time to the principal unauthorized by the agreement; and it has always been held that the giving of time to the principal by a binding contract so alters the position of the surety to his detriment as to absolve him from liability. As to the 115*l.* 16*s.* 8*d.*, therefore, I think the sureties were discharged. The question then arises whether, being absolved as to one payment, they are absolved for ever.

It seems somewhat strange that there is so little authority to be found upon this subject; but I am inclined to think that the true doctrine is laid down in the case to which we have been referred, of *Eyre* v. *Bartrop.* (1) There, the plaintiff joined with his brother in the grant of a redeemable annuity, as a surety for the payment of the same quarterly. The annuity was secured by the demise of real property of the plaintiff's brother and by a bond and judg-

(1) 3 Madd. 221.

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ment of the plaintiff and his brother. The brother afterwards, by deeds to which the plaintiff was not a party, and without his concurrence, entered into a new arrangement with the assignee of the annuity, whereby it was agreed that he should not sue for the annuity for five years from the date of the deed, or from the death of the grantor's father (which should first happen), and that the annuity should be redeemable on different terms. Sir John Leach, V.C., held that the surety was wholly discharged, and was not entitled merely to be exonerated from liability to the arrears of the annuity during the five years, and refused a motion to dissolve an injunction restraining the assignee of the annuity from proceeding to execution upon the judgment. His Honour observed that it could not be denied that if, by any arrangement between the creditor and the debtor, the situation of the surety was altered, he was thereby discharged; but it was said that the situation of the surety was only partially altered during the five years, and that, in respect of the subsequent payments, it remained the same. He was, however, of opinion that the deeds executed without the concurrence of the plaintiff, and the change in the terms of the redemption, had either directly or by their own consequences wholly altered the situation of the surety, and that he was thereby wholly discharged. That being so, the position of the sureties as to the payment due on the 17th of August being changed, they were absolved from liability in respect of any of the subsequently accruing payments.

Two cases have been relied upon as shewing that, as the contract was to be fulfilled at different times, the case may be dealt with as if there were different contracts, and, though absolved as to one payment, the sureties may still be liable in respect of the others. Those cases are *Skillett* v. *Fletcher* (1) and *Harrison* v. *Seymour*. (2) Those, however, were cases where the sureties undertook to guarantee the fulfilment of separate contracts, and not the fulfilment of one contract at separate times. They afford no authority that, in a case like the present, where there is one contract to be fulfilled at different times, the surety may be absolved as to the one period and still held liable as to the others. In truth, those

(1) Law Rep. 1 C. P. 217. (2) Law Rep. 1 C. P. 518.

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cases rather fortify the decision of the Vice-Chancellor Leach in *Eyre* v. *Bartrop*. (1) I am therefore of opinion that the sureties, being absolved from liability in respect of the July supply, were absolved from liability under the agreement altogether; consequently, there must be judgment for the defendant Pollard, and the rule must be discharged.

GROVE, J. I am of the same opinion. As to the first point, I should have thought that, if the letter of the 21st of August had been sent and the inclosed promissory note signed and returned to the secretary and received by him before the expiration of the fourteen days, that would have been an allowing of time within the meaning of the fifth article of the agreement. But I think that an allowance of time (so called) given after the expiration of the fourteen days was not what was contemplated by the parties, and therefore not that which Pollard agreed to become surety for. Reading it as it stands, without looking at consequences, the article runs thus,—Dickinson shall pay the amount of each month's supply within the first fourteen days of the ensuing month after the account delivered, or within such longer time as the company by writing signed by their secretary shall allow him for that purpose. Is that stipulation complied with by a giving of further time by writing signed by the secretary after the original period fixed for payment has run out? I think not. To give a fair meaning to the words, you must necessarily limit them to a further allowance of time whilst the credit is running. Suppose a whole month had been allowed to elapse without any writing of the secretary, would not that clearly have been a breach of the promise upon the faith of which the defendants consented to become sureties, and so have discharged them? Their liability once gone, it cannot be re-imposed by a subsequent writing which condones the allowance of time without writing and seeks to make it equivalent to an allowance in conformity with the agreement. It is within neither the words or the fair meaning of the contract. The whole object, that of tying the debtor to a specific time of payment, is defeated by such a

(1) 3 Madd. 221.

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proceeding. Assuming, therefore, that the letter and the promissory note taken together would be a sufficient allowance of time in writing to satisfy the fifth article of the agreement, they must be given and received before the expiration of the stipulated period of fourteen days. As to the second point, considering the number of bonds with sureties that are daily given, I should have thought that question must have been decided long ago. I think the case of *Eyre* v. *Bartrop* (1) is a sufficient authority to warrant us in holding the general view of the law to be, that, when once a surety is relieved from the obligation which he has undertaken, that obligation cannot be renewed by any subsequent act to which he is no party. Any credit given to the principal debtor which may alter the position of the surety absolves the latter from liability. The detriment to the surety may be more or less in the particular case; but of that he is to be the judge. The cases of *Skillett* v. *Fletcher* (2) and *Harrison* v. *Seymour* (3) are distinguishable on the ground stated by my Brother Brett. Upon both grounds, therefore, I am of opinion that the defendant Pollard is entitled to judgment.

DENMAN, J. I am of the same opinion. The statement of claim is founded on a supposed liability of the sureties for the non-performance of an agreement of the 20th of January, 1874, between the plaintiffs and Dickinson. In his statement of defence, Pollard sets out the agreement, which was made upon the same day as, but before, the execution of the bond sued on. The plaintiffs rely upon the fifth clause of the agreement, which stipulates that the supply of products thereunder shall be estimated on the last day of every month, and that payment for the same shall be made within the first fourteen days of the ensuing month after every estimate shall be so made, "unless the company shall by writing signed by their secretary allow a longer time for payment." Now, I think with my Brother Brett that we are bound to construe that clause as if it were a mere agreement between the company and Dickinson; and, so construing it, I

(1) 3 Madd. 221. (2) Law Rep. 1 C. P. 217. (3) Law Rep. 1 C. P. 518.

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take it to mean that the payment is to be made within the fourteen days unless within that time an allowance of further time is made in the manner indicated. That is the only construction which any reasonable man could put upon such an agreement as this. That being so, in the case which has arisen, there was a sum due under the agreement on the 17th of August, and there had been no writing signed by the secretary allowing further time. Consequently there was then a complete breach of Dickinson's contract. At a subsequent time, the defendants take from Dickinson a promissory note, and thereby suspend their remedy against him for a whole month. The ordinary principle which governs cases of this sort is well laid down in Chitty on Contracts, 10th ed., p. 498, where it is said: "If the creditor gives time to the principal,—that is, if by a new and valid contract between the creditor and the principal, to which the surety does not assent, the period be extended at which, by the contract between them, the principal was originally liable to pay the creditor,—the surety is clearly, as a general rule, freed from responsibility at law and in equity. Thus, in *Coombe* v. *Woolf* (1), it appeared that the defendant guaranteed the payment of the price of porter which was to be delivered to J., the memorandum containing no stipulation as to the term of credit. The custom of the plaintiff was to give six months' credit, and then sometimes to take a bill at two months. The plaintiff, without the defendant's knowledge, allowed three months to elapse after the six months, and then took from J. a promissory note at two months for the debt, thus virtually giving a credit of eleven months; and the Court held that the defendant as surety was exonerated, upon the ground that his situation was prejudiced by the plaintiff having precluded himself by taking the note from proceeding during its currency against the principal." That case is exactly like this. I am not aware of any case which decides that the liability of a surety, upon a contract under which payments by the principal are to be made at certain times, is severable to such an extent as that, after time given in respect of one payment, you can sue the surety in respect of subsequent breaches, as to which no time has been given. The cases of *Skillet*

(1) 8 Bing. 156.

v. *Fletcher* (1) and *Harrison* v. *Seymour* (2) do not bear that out. They proceeded on the ground that the contracts were severable and might be dealt with as if there had been distinct contracts in respect of each of the matters.

Judgment for the defendant Pollard.

Solicitors for plaintiffs: *Prior, Bigg, Church, & Adams.*
Solicitor for Dickinson: *S. J. Robinson.*
Solicitor for Pollard: *William Beck.*
Solicitors for Child: *Carey, Warburton, & De Paula.*

DAVIS *v.* SPENCE.

June 20.

Practice—Leave to sign Judgment under Order XIV, Rule 3 (a) Affidavit in Reply to Defendant's Answer.

Upon an application by the plaintiff for leave to sign judgment under Order XIV, Rule 3, the Court or judge may in their or his discretion allow the plaintiff to file an affidavit in reply to the defendant's affidavit.

GIBBONS, for the defendant, moved to set aside an order of Huddleston, B., allowing the plaintiff to sign final judgment under Order XIV, Rule 1, under the Judicature Act, 1875. (3) The affidavit upon which the summons was obtained, that of the plaintiff, was as follows:—"The above-named defendant is justly and truly indebted to me in the sum of 151*l.* 9*s.* 7*d.*, being the balance of an account for commission due from the defendant to me as a stock and share broker, and for work done and money expended

(1) Law Rep. 1 C. P. 217.
(2) Law Rep. 1 C. P. 518.
(3) "Where the defendant appears on a writ of summons specially indorsed under Order III, Rule 6, the plaintiff may, on affidavit verifying the cause of action, and swearing that in his belief there is no defence to the action, call on the defendant to shew cause before the Court or a judge why the plaintiff should not be at liberty to sign final judgment for the amount so indorsed, together with interest, if any, and costs; and the Court or judge may, unless the defendant by affidavit or otherwise satisfy the Court or judge that he has a good defence to the action on the merits, or disclose such facts as the Court or judge may think sufficient to entitle him to be permitted to defend the action, make an order impowering the plaintiff to sign judgment accordingly."

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in connection with transactions on the Stock Exchange entered into by me for the defendant at his request,"—setting out the particulars. The affidavit of the defendant in answer to the application was as follows,—1. "I (the defendant) am advised and believe that I have a good defence to this action on the following grounds,—2. The amount sought to be recovered is for Stock Exchange differences or time bargains in the price of stocks and shares purchased for me by the plaintiff and sold by him without any authority from me,—3. The settling days on such transactions according to the rules of the Stock Exchange are twice in each month, the middle and the end of the month,—4. On the 13th of March last past, the making up day for the 15th of March, the settling day, I received a letter from the plaintiff, informing me that the shares the subject of this action had been carried over to the then next account, the end of the month, the 28th day of March, and charging me with contangoes, or the usual charges for the continuation of such accounts,—5. On the 17th of March, two days after the settling day, the plaintiff, without giving me any notice, and without any authority, sold the shares, whereby a great loss was sustained, and the making up price for the next account day, on the 28th of March (to which time the shares had been carried over) was then higher than the price the plaintiff sold them at on the 17th of March, and less loss would have been incurred; and I say the plaintiff had no right to sell the shares before the next settling day, the 28th of March, after having sent me a letter stating that they had been carried over to that day, and charged me for carrying them over from the 13th of March to the 28th of March last."

The learned judge allowed the plaintiff to file an affidavit in reply, as follows:—2. The amount sought to be recovered in the action consists in the first place of a balance of an account stated amounting to 108*l.* 2*s.* 11*d.*, as to which the defendant by his affidavit sets up no defence whatever,—3. I deny that the stocks and shares purchased for the defendant by me were sold by me without any authority from the defendant, as stated in his affidavit, and say that the contrary is the case. The affidavit then went on to shew the circumstances.

The order in question gives the plaintiff an extraordinary remedy

in derogation of the defendant's common-law right, and ought to be construed most strictly. The defendant having shewn such a case as entitled him to defend the action, an affidavit in reply ought not to have been received. It was in fact trying the case upon affidavit.

BRETT, J. I think there should be no rule. The construction of Order XIV, Rule 1, seems to me to be perfectly clear. It is in effect adopting the machinery given by the Bills of Exchange Act, 1857. The argument of Mr. Gibbons is, that, the plaintiff having by his affidavit made out a primâ facie case, which is met by counter-statements by the defendant, it was not competent to the judge to allow an affidavit in reply. The rule he relies on consists of two parts: by the first part, the plaintiff is to shew a primâ facie case sufficient to call upon the defendant to shew cause why the plaintiff should not be at liberty to sign final judgment: the second part requires the defendant by affidavit or otherwise to satisfy the Court or judge that he has a defence on the merits, or to disclose such facts as may be thought sufficient to entitle him to be permitted to defend. The obligation on the defendant to shew cause by necessary implication allows the plaintiff to answer the defendant's case. The defendant has to satisfy the judge that he has a good defence, or at least that the plaintiff's claim is so doubtful as to make it a fair case to try. It seems to me that the judge has exercised a proper discretion here.

GROVE, J. I am of the same opinion.

LINDLEY, J. I am of the same opinion. It is obvious that the defendant's affidavit in answer is not final; for, rule 3 provides that "the judge may, if he think fit, order the defendant to attend and be examined upon oath, or to produce any books or documents or copies of or extracts therefrom."

Rule refused.

Solicitor for plaintiff: *H. Montague.*
Solicitor for defendant: *G. H. Mirfin.*

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June 14.

KEITH AND ANOTHER *v.* BURROWS AND ANOTHER.

Mortgage of Ship—Effect of Non-registration—Merchant Shipping Act, 1854, 17 & 18 *Vict. c.* 104.

Under s. 69 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), the only effect of the omission to register a mortgage of a ship is, to postpone the mortgagee's claim to that of a subsequent mortgagee or transferee whose mortgage or transfer is registered before it. Therefore the non-registration of the mortgage affords no answer to the claim of the first mortgagee to freight earned by the ship as against a purchaser of the cargo without notice of the mortgagee's title.

The mere omission by a person to do something which it is not his duty to do, but which if done would have prevented loss to another, is not sufficient to render such person liable for such loss, or to deprive him of any right which he would otherwise have had against the other.

An unregistered mortgage of a ship passes to the mortgagee the ownership of the ship, as against a subsequent equitable assignment of the freight to a third person,—at all events, in the absence of fraud or such gross and wilful negligence as is equivalent to fraud.

On the 1st of December, 1874, M., the owner of 60/64ths of the ship *Stonehouse*, then at San Francisco (the captain being owner of the residue), mortgaged his interest to the plaintiffs for 7500*l.* and further advances. Freights not being obtainable at San Francisco, the captain on the 2nd of December procured a shipment of wheat there "on account of the ship," which cargo was consigned to the orders of the shippers, under bills of lading stating the freight payable on delivery to be 1*s.* per ton, and they (the shippers) drew bills on M. for the price at sixty days sight, which were attached to the bills of lading. The ordinary freight at this time was 55*s.* per ton. On the 4th of January, 1875, the defendants advanced M. 3000*l.*, and on the 22nd of February a further sum of 9000*l.*, on the security of the cargo, without notice of the plaintiffs' mortgage,—it being arranged that they should sell the cargo and receive the proceeds on M.'s account. Before carrying out this arrangement with M., the defendants searched the ship's register, and found no registered incumbrance of his interest therein. On the 2nd of February, 1875, there was a further mortgage of the ship by M. to the plaintiffs for 4000*l.* and further advances. On the 26th of February, M. assigned to the defendants the freight of the *Stonehouse* at 55*s.* per ton; and on the 2nd of March M. further mortgaged his interest in the ship to one H., who registered his mortgage on the 3rd of March. The plaintiffs' mortgages were not registered until the 6th of March.

The *Stonehouse* arrived at Liverpool on the 13th of April, when H. and the plaintiffs took possession of her. H., being satisfied with his security on the ship, did not claim the freight.

On the 19th of February, 1875, the defendants and M. sold the cargo to J. &

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Co. on the terms of freight being paid at 55s. per ton; and by subsequent arrangement the defendants acquired the rights of J. & Co.:—

Held, that H., the first registered mortgagee having abandoned all claim to the freight, the plaintiffs as second mortgagees were entitled to claim it as against the defendants.

Overruled on appeal 2 C.P.D. 165. C.A.; Overruled on appeal by H.L. 2 App. Cas. 636

ACTION by the plaintiffs who claimed as mortgagees in possession of the ship *Stonehouse* to be entitled to freight in respect of a cargo of wheat. The following case was stated for the opinion of the Court:—

1. The plaintiffs are merchants carrying on business under the style or firm of James Wyllie & Co., in London. The defendants are corn-factors and brokers carrying on business under the style or firm of Burrows & Perks, in London. The action is brought by the plaintiffs who claim, as mortgagees in possession of the ship *Stonehouse*, to recover moneys alleged to have become due and payable in respect of freight from the defendants under the circumstances hereinafter appearing.

2. Mr. John Morison of Billiter Street, trading under the style or firm of John Morison & Co., was during the period covered by this case the registered owner of 60/64ths of the *Stonehouse;* Mr. Bley, the captain, being the registered owner of the remaining 4/64ths.

3. On the 1st of December, 1874, Morison executed a mortgage of his 60/64ths of the ship in favour of the plaintiffs to secure 7500*l.* and interest in account current, and any further sum which might become due.

4. The *Stonehouse* was at this time at San Francisco seeking employment, and, the freight market being disorganised owing to a recent commercial failure, her captain, Bley, determined, rather than accept the low offers of freight which were being made in the thick of the crisis, to load a cargo of wheat "on account of the ship," hoping by its sale in England to realise a better margin than what was available as freight at the port of loading.

5. Accordingly, a cargo of 23,644 sacks of wheat (being the cargo in respect of which the present claim arises) was obtained through Messrs. Parrott & Co., merchants at San Francisco, and shipped on board the *Stonehouse*. The invoice, dated the 2nd of December, 1874, stated that the wheat was shipped by Parrott & Co. on

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board the *Stonehouse*, bound to Falmouth or Downs for orders, consigned to order, that is, to the order of Parrott & Co. (they thus keeping control over the cargo until the money found by them for the purchase thereof should be paid), by order of John Morison & Co., for account and risk of whom it might concern.

6. Bills of lading were made out for the wheat, deliverable to the order of and were handed to Parrott & Co., stating the freight payable on delivery to be 1*s.* per ton. Parrott & Co. simultaneously drew bills of exchange on Morison at sixty days' sight against the wheat, to recoup themselves for the price of the wheat and their commission, and sold the bills of exchange with three bills of lading indorsed by Parrott & Co. attached thereto, to the bank of British North America.

7. It is a common practice in many places for foreign shippers, when a cargo is to be shipped "for the account of the ship," to draw bills of lading for a nominal instead of a blank freight, there being an opinion among merchants that a blank freight is not a desirable thing.

8. On or about the 3rd of December, 1874, the *Stonehouse* sailed from San Francisco. The rate of freight general at this date at San Francisco was only 55*s.* per ton; but the plaintiffs were informed by Morison that they would receive 5000*l.* to 6000*l.* for the freight of the *Stonehouse*. The defendants, however, did not know that Morison had given the plaintiffs any information on the subject, or that they had any interest in the ship.

9. On the 21st of December, 1874, Morison accepted the bills of exchange payable at the London and County Bank on the 22nd of February, 1875.

10. On the 1st of January, 1875, Morison effected two policies of insurance in respect of the *Stonehouse*, on freight valued at 4000*l.* and 1000*l.* respectively.

11. The sum necessary to meet the bills of exchange at maturity was 10,364*l.* 19*s.* 4*d.*; and at some time in December or the beginning of January, it had been arranged between Morison and the defendants that the defendants should advance to Morison the moneys necessary for the purpose, that the defendants in return should be at liberty to sell the cargo and receive the proceeds of sale on Morison's account, and that the bills of lading and policies

of insurance should be deposited with the defendants as security for their advances.

12. Before making and carrying out this arrangement with Morison, the defendants searched the ship's register at the Custom House, and found that 60/64ths were registered in Morison's name, and that there was no incumbrance whatever on the register. The defendants had no notice in any way that Morison had mortgaged his shares in the *Stonehouse*.

13. On the 4th of January, 1875, the defendants advanced to Morison 3000*l*., and shortly afterwards, in pursuance of the arrangements then made, received from him the former of the two policies, being the policy on freight valued at 4000*l*.

14. On the 2nd of February, 1875, Morison executed another mortgage in similar terms of his interest in the ship to the plaintiffs, to secure 4000*l*. and further advances. Morison subsequently, on the 2nd of March, 1875, further mortgaged his interest in the *Stonehouse* to Joseph Harrold, who registered his mortgage on the 3rd of March, 1875, and thus became the first mortgagee, the plaintiffs not having registered their mortgages until the 6th of March, 1875, as hereinafter mentioned.

15. On or about the 16th of February, 1875, the defendants offered the cargo of wheat for sale to divers persons on cost freight and insurance terms, but did not succeed in obtaining a purchaser until on the 19th of February they effected a sale of the cargo on the terms hereinafter appearing.

16. On the 19th of February, 1875, the defendants, on behalf of Morison, and on their own account to the extent of their advances, sold the cargo to Henry Jump & Sons, of Liverpool. The following is a copy of the contract signed by Harris, Brothers, & Co., brokers, on behalf of the buyers:— 2 C P D 167

London, 19th February, 1875.

Bought of Messrs. John Morison & Co. through Messrs. Burrows & Perks, for Messrs. Henry Jump & Sons, Liverpool, a cargo of Californian wheat of fair average quality of the season's shipments when shipped.

Shipped per *Stonehouse* 1st class from San Francisco. Bill of lading dated about 2nd December, 1874, say 23,644 bags, containing 3,089,775 lbs., at the price of 43*s*. 6*d*. per quarter of 500 lbs. shipped; bags weighed and paid for as wheat; including freight and insurance to any safe port in the United Kingdom of Great Britain and Ireland, calling at Falmouth or the Downs for orders. Vessel to discharge afloat. No charge for dunnage or bags. Payment, cash in

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London within seven days, less discount for unexpired portion of two months from this date at 5 per cent. per annum in exchange for bill of lading and policies of insurance (free of war risk) effected with approved underwriters, but for whose solvency sellers are not responsible. Damage by sea-water or otherwise (if any) to be taken as sound.

Invoice quantity is to be final. Sellers to pay our brokerage of half per cent. contract cancelled or not cancelled. Any average incurred before this date to be for account of and settled by sellers. Sellers to give policies of insurance for 2 per cent. over the invoice amount including the ½ per cent., and any amount over this to be for sellers' account: three days for awaiting orders at port of call. To discharge according to the custom of the port. Should any dispute arise, it is agreed by buyer and seller to leave the same to be settled by two London corn-factors respectively chosen, with power to call in an umpire, whose decision is to be final.

As cargo is coming on ship's account, freight is to be computed at 55*s.* per ton of 2240lbs., and invoice to be rendered accordingly.

Harris, Brothers, & Co., Brokers.

17. The defendants would have had a difficulty in disposing of the cargo without allowing an amount equivalent to freight to remain unpaid until the vessel's arrival, and would not have obtained so large a price for it.

18. In accordance with the above contract an invoice was subsequently made out by Morison, of which the following is a copy:—

Invoice of cargo wheat per *Stonehouse* @ San Francisco sold to Messrs. Henry Jump & Sons, Liverpool, as per contract of 19th February, 1875.

23,644 sacks wheat, weighing 3,089,775 lbs.=	£	*s.*	*d.*
6179$\frac{275}{500}$ qrs., at 43*s.* 6*d.* per 500 lbs. . . .	13,440	10	5
Freight on tons 1379 : 7 : 1 : 3 55*s.* per 2240 lbs. .	3793	5	0
	9647	5	5
Brokerage, ½ per cent.	67	4	0
	9580	1	5
Interest from 26 Feb. to 19 April, 52 days, at 5% .	68	4	10
	£9511	16	7

London, 22nd Feb. 1875. Burrows & Perks.

19. On the 22nd of February, 1875, Morison obtained a further advance from the defendants of 9000*l.*, making with the sum of 3000*l.* previously advanced the sum of 12,000*l.* With such advance he paid the said bills of exchange at maturity, and received the bills of exchange and the bills of lading thereto

attached from the London and County Bank, as arranged with the defendants.

20. On the 23rd of February, 1875, in pursuance of such last-mentioned arrangement, Morison handed the bills of exchange with the three bills of lading attached to the defendants, and the following memorandum was indorsed on the bills of lading and signed by Morison:—

> We assign our interest in the within freight to Messrs. Burrows & Perks, London, whose receipt, or that of their appointed agent, will be sufficient discharge.
>
> The freight assigned is at the rate of 55s. per ton, and not the nominal amount of 1s. per ton. J. Morison & Co.
>
> 24/2/75.

Such indorsement, although dated the 24th of February, 1875, was not really made and signed until about the 26th of February.

21. At the same time Morison handed to the defendants the aforesaid invoice made out in pursuance of the contract with Messrs. H. Jump & Sons for transmission to the buyers, together with a letter to the defendants themselves dated the 25th of February, 1875, and inclosing the policies therein referred to, which letter was as follows:—

> 21, Billiter Street, 25th Feb., 1875.
>
> Messrs. Burrows & Perks,
>
> Dear Sirs,—We further give you in security policy of insurance on wheat 1500*l.* and on freights 1000*l.*, both in the *Stonehouse*. Should this vessel be lost, we trust you will give us the collection on them as well as on the former policies.
>
> J. Morison & Co.

Both of the above policies are in the Marine Insurance Company.

22. The invoice was duly forwarded by the defendants to H. Jump & Sons, who thereupon paid the balance thereon appearing of 9511*l.* 16*s.* 7*d.* in pursuance of their contract. The cargo was subsequently re-sold by Jump & Sons to Ross T. Smythe & Co., of Liverpool.

23. On the 6th of March, 1875, the plaintiffs duly registered their mortgages.

24. On the 13th of April, 1875, the *Stonehouse* arrived at Falmouth for orders. She was then taken possession of by Mr. Harrold and the plaintiffs as first and second mortgagees respec-

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tively. Mr. Harrold's debt being more than secured by the ship, he laid no claim to the freight. The *Stonehouse* proceeded in the possession of Harrold and the plaintiffs to Liverpool, where she arrived on the 19th of April, 1875, on which day Messrs. Lowless & Co. on behalf of the defendants wrote a letter to the plaintiffs' attorneys, Messrs. Freshfields & Williams, as follows :—

Dear Sirs,—We have a telegram that this vessel (*Stonehouse*) is now off the port and that the market is a falling one. Should there, therefore, be any difficulty in obtaining delivery, the purchasers may repudiate their bargain, and a loss of 1000*l.* might easily be sustained, in addition to the charges for landing and warehousing. Will you, therefore, please let us have your determination instantly. We are obliged to give you notice that our clients will seek to recover all damages sustained from Messrs. Wyllie & Co.; and we have given you special notice of the circumstances, in order that our clients may be entitled to recover. We hope, however, that there will be no necessity for this. Lowless & Co.

25. The plaintiffs refused to allow Messrs. Ross T. Smythe & Co. to take delivery of the cargo, except on payment of freight at 55*s.* per ton, and were prepared to protect themselves in the manner indicated in the Merchant Shipping Amendment Act, 1862; but, to avoid such detention of the cargo, and the deterioration and expenses which would have been the result of it, the following agreement was made between the plaintiffs and the defendants, through their respective attorneys :—

It is hereby agreed between Messrs. Freshfields & Williams, as representing Messrs. James Wyllie & Co., and Messrs. Lowless & Co., as representing Messrs. Burrows & Peeks, that 3500*l.*, being the amount of freight on the cargo of the ship *Stonehouse* claimed by Messrs. James Wyllie & Co. as second mortgagees in possession of the *Stonehouse*, shall be paid into the London and Westminster Bank in the joint names of Messrs. Freshfields & Williams and Messrs. Lowless & Co., to abide the result of an action to be brought by Messrs. James Wyllie & Co., against Messrs. Burrows & Perks, who hereby admit, for the purposes of the action, that they are the owners of the cargo under the bill of lading thereof, and liable to pay whatever freight may be due thereon. The action to be commenced within thirty days from this date, and duly prosecuted. In the event of no action being brought within the time aforesaid, or of Messrs. James Wyllie & Co. not obtaining a verdict in the said action, the amount so deposited, with any interest thereon, is to be paid to Messrs. Burrows & Perks or order; and, in the event of Messrs. James Wyllie & Co. recovering a verdict for the said sum of 3500*l.*, or any part thereof, the amount of such verdict is to be paid to them or order out of the sum deposited, and the balance (if any) to Messrs. Burrows & Perks or order.

It is admitted, for the purposes of the said action, that the amount of freight specified in the bill or bills of lading has been tendered. Messrs. James Wyllie & Co. to withdraw any stop which they may have put upon the goods on the

money being deposited. Messrs. Burrows & Perks to have the same right of recovering interest on the sum to be deposited as if the money had been paid at the proper time into a wharfinger's hands under the provisions of the Merchant Shipping Amendment Act. Dated 19th April, 1875.

Freshfields & Williams.
Lowless & Co.

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26. It was subsequently found that freight at 55*s.* per ton amounted to 3577*l.* 5*s.* 7*d.*, and upon the execution of the agreement and the payment of the 3577*l.* 5*s.* 7*d.*, as subsequently agreed, instead of 3500*l.*, into the London and Westminster Bank, the plaintiffs gave delivery of the cargo.

The question for the opinion of the Court (who were to have liberty to draw all inferences of fact), was, whether the plaintiffs were entitled to refuse delivery except on payment of freight at the rate of 55*s.* per ton, or whether any freight was due on the said cargo beyond freight at the rate of 1*s.* per ton. If the opinion of the Court on either point should be in the affirmative, judgment was to be entered for the plaintiffs for 3577*l.* 5*s.* 7*d.*, with costs; if in the negative, for the defendants.

The case was argued on the 10th and 21st of February last, by *Thesiger, Q.C.*, and *Webster*, for the plaintiffs, and by *Herschell, Q.C.*, and *C. S. Bowen*, for the defendants. The arguments and the authorities cited are fully noticed in the judgment.

Cur. adv. vult.

June 14. The judgment of the Court (Brett, Archibald, and Lindley, JJ.,) was delivered by

LINDLEY, J. The material facts are these:—December 1st, 1874, mortgage by Morison to plaintiffs of a ship (i.e. 60/64ths, but nothing turns on this) for 7500*l.* and further advances. January 4th, 1875, the defendants advanced Morison 3000*l.* on security of cargo, without notice of the plaintiffs' mortgage. February 2nd, 1875, Morison again mortgaged the ship to the plaintiffs for 4000*l.* and further advances. February 19th, 1875, sale of cargo by defendants and Morison to Jump & Sons on terms of freight being paid at 55*s.* a ton. February 22nd, 1875, further advance by the defendants of 9000*l.* February 26th, 1875, assignment to them (defendants) of the freight at 55*s.* per ton, as security

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for their advances. March 2nd, 1875, Morison mortgaged the ship to Harrold. March 3rd, 1875, Harrold's mortgage was registered. March 6th, 1875, plaintiffs registered their mortgage. April 13th, 1875, the ship arrived, and Harrold and the plaintiffs took possession. Harrold, being satisfied with his security on the ship, did not claim the freight. An arrangement was come to by which the defendants acquired Jump & Sons' rights.

Consider first how the case would have stood if there had been no mortgage to Harrold. Two questions would then have arisen,—1. Would the freight payable to the plaintiffs as first mortgagees in possession have been 55*s.* per ton, or only 1*s.*? 2. Would the plaintiffs have been entitled to this freight as against the defendants?

1. With respect to the first of these questions, it is to be observed that, although a nominal freight of 1*s.* was made payable by the bills of lading, the cargo being bought for the owner of the ship, yet in the contract with Jump & Sons the freight payable is agreed to be 55*s.* per ton, and the freight assigned to the defendants is likewise freight at 55*s.* The defendants therefore, whether they claim through Jump & Sons or under the assignment to themselves, are not in a position to deny that the sum payable as and for freight was to be 55*s.* per ton. It is true that this sum was not made payable when the cargo was put on board, nor when the defendants made their first advances on the cargo; and that it was made payable by an agreement entered into by the ship-owner and the defendants and the purchasers of the cargo after the date of the plaintiffs' mortgage. But there is no reason why the benefit of this agreement should not accrue to the mortgagee of the ship on his taking possession of her. On taking such possession, he is entitled to all freight payable under charterparties or bills of lading; and there is no difference (material to the present case) between freight payable under such documents as these and money payable as and for freight under such an agreement as that which has here to be considered. No authority on this point was referred to on either side; and, on principle, 55*s.* having been fixed by all parties interested in the cargo to be the freight, must be so treated for all the purposes of the case.

2. The question whether the plaintiffs as mortgagees of the ship or the defendants as assignees of the freight would have had the better title to it, but for the mortgage to Harrold, turns on the true nature of a mortgage of a ship and on the effect of the omission of the plaintiffs to register their mortgage before the freight was assigned to the defendants.

The mortgage to the plaintiffs was in the statutory form, and by it the ship was "mortgaged" to them. The word "mortgage" is a well-known word, and signifies a transfer of property by way of security: see 2 Bl. Com. 158; Termes de la Ley, *Mortgage*. A mortgage is a transfer of all the mortgagor's interest in the thing mortgaged: but such transfer is not absolute; it is made only by way of security; or, in other words, it is subject to redemption. Unless, therefore, there is any statutory enactment to the contrary, and so far as there is no enactment to the contrary, the plaintiffs in this case acquired by their mortgage the whole of the mortgagor's interest in the ship, or, in other words, the legal title to the ship as a security.

Such is primâ facie the effect of the instrument of mortgage. But the statutes relating to ships must be examined with a view to determine what the consequences of registering or not registering may be.

Under the older statutes relating to merchant shipping, all transfers and mortgages were made by a bill of sale; and such bill of sale had no effect whatever, either at law or in equity, until registration: see the cases collected in *Liverpool Borough Bank* v. *Turner* (1); Maclachlan on Shipping, 2nd ed. p. 39.

The Merchant Shipping Acts now in force, however, make a marked distinction between transfers of ships (otherwise than by way of security) and mortgages: and there are different groups of sections with distinct headings applicable to these two different subjects: see 17 & 18 Vict. c. 104, ss. 55–65, which relate to transfers and transmissions, and ss. 66–75, which relate to mortgages. Amongst other distinctions between these two modes of dealing with ships, the following are the most note-worthy:—A transfer (otherwise than by way of mortgage) must be by a bill of

(1) 1 J. & H. 159; 2 D. F. & J. 502.

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sale (s. 55), and must be produced to the registrar for registration (s. 57); and the transferee (if not a corporation) must make a declaration that he is a natural-born subject: see s. 56, and sched. F.

On the other hand, a mortgage must be by a different kind of instrument (s. 66); and there is no enactment requiring such instrument to be produced to the registrar (compare s. 66 with s. 57); and the mortgagee is not required to make any declaration as to his nationality.

It is true that, in the *Liverpool Borough Bank* v. *Turner* (1), V.-C. Wood and Lord Campbell held that an unregistered equitable mortgage of a ship could not be enforced; but, in consequence of this decision, the 25 & 26 Vict. c. 63, s. 3, was passed; and the validity of an unregistered mortgage, as against all persons except registered transferees or mortgagees (see ss. 43 and 69 of the Merchant Shipping Act, 1854), can hardly now be disputed: see *Stapleton* v. *Haymen*. (2)

It appears from the Merchant Shipping Act, 1854, itself that a mortgagee has an interest in the ship capable of transmission by bankruptcy, death, or marriage (s. 74); and that on payment off of the debt secured by a registered mortgage, and entry of payment in the registry, the estate if any which passed to the mortgagee vests in the person in whom the same would have vested if the mortgage had not been made: s. 68.

The mortgagee, however, is not to be deemed the owner of the ship, except so far as may be necessary for making her a security for the mortgage debt (s. 70). This section was inserted for his protection against liabilities which might have attached to him by reason of his interest in the ship; see *Dickinson* v. *Kitchen* (3); and would have been quite unnecessary if the mortgage transferred no interest in the sense of ownership in her to him; or, in other words, if it created a mere charge on her in his favour.

Sect. 72, which protects registered mortgagees of ships from the operation of the reputed ownership clauses of the Bankruptcy Acts, would also be unnecessary if a mortgagee had not such an

(1) 1 J. & H. 159; 2 D. F. & J. 502.

(2) 2 H. & C. 918; 33 L. J. (Ex.) 170.

(3) 8 E. & B. 789.

interest in the ship as might render him her true owner within the meaning of those clauses.

Again, the right of a first registered mortgagee to take possession of the ship is too well settled to be capable of dispute; but the statute confers no such right in express terms; and it only exists by reason of the ownership transferred to the mortgagee by the mortgage itself. A mere charge would confer no such right: see Fisher on Mortgages, 197. But, as a mortgagee, unless in possession, would have no power of sale if it were not expressly conferred upon him, and as the statutory form of mortgage contains no such power, the statute itself expressly confers it on registered mortgagees: s. 71. This, however, affords no argument against the view that the mortgage itself confers on the mortgagee an interest in the sense of ownership in the ship herself.

The conclusion, then, to be drawn from the mortgage and the statute, is, that the mortgagee of a ship, like the mortgagee of any other property, acquires an ownership in the ship, viz. such ownership as the mortgagor has to give. A first mortgagee will thus acquire the whole ownership in the ship, but only of course as a security for his money. Second and other mortgagees will only acquire the interest left in the mortgagor, or, in other words, his right to redeem. That right will be legal or equitable, according as the time for paying off the first mortgage has not yet arrived or has passed.

That this is the true nature of a mortgage of a ship appears not only from the above observations, but also from the following decisions,—*Dickinson* v. *Kitchen* (1) and *Liverpool Marine Credit Co.* v. *Wilson.* (2)

The plaintiffs in this case having acquired by their mortgage the ownership of the ship, and that title being prior in point of date to the equitable assignment of the freight to the defendants, such title must prevail against the latter, unless there be some sufficient reason to the contrary: see *Rice* v. *Rice.* (3) The only reason alleged is, the non-registration of the plaintiffs' mortgage before the date of the assignment to the defendants. If an unregistered mortgage of a ship were null and void, or if it had no

(1) 8 E. & B. 789. (2) Law Rep. 7 Ch. 507.
(3) 2 Drew. 73.

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legal effect before the time of registration, then the title of the plaintiffs would have accrued after that of the defendants, and would have to be postponed to theirs: see *Lindsay* v. *Gibbs*. (1) But the present Merchant Shipping Acts contain no enactment to this effect; and, as already observed, an unregistered mortgage is not now void. Moreover, s. 69 of the Act of 1854 enacts in effect that, if there is more than one registered mortgage, the mortgagees shall be entitled in priority one over the other according to the dates of registration. So far, therefore, as the Act itself is concerned, the only consequence of not registering a mortgage is to postpone it to a subsequent mortgage or transfer which is registered before it (see s. 43).

But it was contended that, upon general principles of equity, and apart from any statutory enactment, the plaintiffs had lost their priority by reason of their own negligence in omitting to register their mortgage. The case states that the defendants searched the register before they advanced their money on the freight, and they were therefore really misled by the non-registration of the plaintiffs' security: and it is contended that this is one of those cases which ought to be decided according to the rule that, whenever one of two innocent parties must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it. This rule is a well-known rule both at law and in equity; but it is one by no means easy of application, owing to the ambiguity of the word "enabled." The plaintiffs did not register their mortgage; but they were not themselves party or privy to any fraud on the defendants. The plaintiffs did not know that money was being obtained on the security of the freight; and, in truth, there is nothing save the mere omission to register which can be urged against them. But the mere omission by a person to do something which it is not his duty to do, but which if done would have prevented loss to another, is not sufficient to render such person liable for such loss, nor to deprive him of any right which he would otherwise have had against that other. There are decisions to this effect both at law and in equity: see, at law, *Arnold* v. *The Cheque Bank* (2), decided by this Court during the last sittings, where the cases at law were fully con-

(1) 22 Beav. 522. 2 Jur. N.S. 1039. (2) Ante, p. 578.

sidered. In equity, it is well settled now that the mere omission by a first mortgagee to obtain the title-deeds from the mortgagor is not sufficient to postpone the first mortgage in favour of a subsequent mortgagee who bonâ fide advances his money in the belief that the property is unincumbered, and who obtains the deeds: see *Evans* v. *Bicknell* (1); *Hewitt* v. *Loosemore*. (2) To postpone the first mortgage in such cases, there must be either fraud or such gross and wilful negligence as is equivalent to it.

In the present case, but for Harrold's mortgage the plaintiffs would have had a clear prior legal title to the freight as against the defendants: and although, if the plaintiffs had registered their mortgage when it was made, the defendants would not have been misled, there is no fraud, nor such gross and wilful negligence imputable to the plaintiffs as is sufficient to deprive them of their prior legal rights.

3. It remains to consider the effect of Harrold's mortgage. This, although subsequent in point of date to the plaintiffs' mortgage, was registered before it, and by s. 69 of 17 & 18 Vict. c. 104 became entitled to priority over it. By reason of this statutory priority Harrold became first mortgagee of the ship, and became entitled to take possession of her and to receive her freight. Having paid himself, he would hold any surplus for the benefit of the subsequent incumbrancers according to their priorities. In point of fact, Harrold was content to look to the ship only, and he laid no claim to the freight. But the plaintiffs had also taken possession of the ship; and they claim the freight as second mortgagees. The priority gained by Harrold cannot affect the rights of the plaintiffs as against the defendants; and, Harrold's claims being satisfied, his mortgage may for all present purposes be disregarded. The mortgage of the plaintiffs became, as between them and Harrold, a second mortgage instead of a first mortgage; but the plaintiffs' mortgage continued to be, as it always was, prior in point of date to the assignment to the defendants. Even, therefore, if the plaintiffs' mortgage became, for all purposes, and as against all persons, an equitable as distinguished from a legal mortgage, its priority in point of date remained unaffected. It was, indeed, contended that, by reason of Harrold's mortgage and

(1) 6 Ves. 174, 183. (2) 9 Hare, 449.

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its priority over the plaintiffs' mortgage, this last could only be regarded as an equitable mortgage dating from the time of its registration. But this contention is based upon the erroneous supposition that an unregistered mortgage has no validity until it is registered.

It was further contended that the plaintiffs, having become second mortgagees, had no right to take possession of the ship, and that their right to freight was never therefore perfected. But, although a second mortgagee has no legal as distinguished from equitable right to possession, and although he cannot take possession as against a first mortgagee, yet, as against all other persons, he has a right to take possession, and can enforce such right, if necessary, by obtaining the appointment of a receiver: see *Liverpool Marine Credit Co.* v. *Wilson* (1), where the rights of a second mortgagee of a ship are pointed out. In this particular case, the plaintiffs took possession; and it was therefore unnecessary to apply for a receiver. If they had neither taken possession nor applied for a receiver, still, as the first mortgagee did take possession, it was probably unnecessary for the plaintiffs to do more than give him notice of their claim; for, he would, after paying himself, hold all surplus moneys received by him in trust for the persons beneficially interested in them, according to their priorities.

For these reasons our judgment is for the plaintiffs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Freshfields & Williams.*
Solicitors for defendants: *Lowless & Co.*

(1) Law Rep. 7 Ch. 511.

FRENCH AND ANOTHER *v.* GERBER AND OTHERS. 1876
June 14.

Shipping—Construction of Charterparty—Proviso for Cesser of Liability of the Charterers—Demurrage—Lien for Freight.

The defendants chartered a ship to carry a cargo of rice from Akyab to a "good and safe port" in the United Kingdom, &c., calling at Queenstown or Falmouth for orders, which were to be forwarded within forty-eight hours after notice of her arrival. The charterparty contained the following clause,—"It is further agreed that the liability of the charterers shall cease as soon as the cargo is on board, provided the same is worth the freight at port of discharge; but the owners of the ship to have an absolute lien on the cargo for all freight, dead-freight, and demurrage, which they shall be bound to exercise."

In an action against the charterers (who had sold the cargo before arrival) two breaches were assigned,—1. that the defendants or their agents failed to give orders as to the ship's port of discharge,—2. that they gave orders for the ship to discharge at a port which was not a "good and safe port" within the meaning of the charterparty; whereby the plaintiffs were delayed and put to expense in obtaining payment of the freight:—

Held, on demurrer, that the above clause discharged the charterers from all liability for acts and defaults of themselves or their agents happening after as well as before the ship was loaded, whether covered by the owners' lien or not.

DECLARATION that the plaintiffs, by the master of the *Theresa*, and the defendants, by Burot, Gerber, & Co., their agents at Akyab, entered into a charterparty in the words and figures following:—

Akyab, 8th April, 1874.

It is this day mutually agreed between Mr. R. C. Downie, in command of the good ship or vessel called the *Theresa*, classed A. 1 until end of 1874, under British colours, whereof pro tem. R. C. Downie is master, of the measurement of 705 tons or thereabouts, now off Akyab, and Messrs. Burot, Gerber, & Co., of Akyab, merchants and freighters, that the said ship, being copper-sheathed or yellow-metalled, tight, staunch, and strong, and every way fitted for the voyage, shall with all convenient speed sail and proceed to a loading berth in the port of Akyab, or so near thereunto as she may safely get, always afloat, and there, having discharged her cargo or ballast, and being copper-sheathed or yellow-metalled, tight, &c., load from the agents of the freighters, who may direct the ship to the most convenient safe anchorage, a full and complete cargo of cargo rice in bags as usual, which the freighters bind themselves to ship, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and, being so loaded, shall therewith proceed with all dispatch to Queenstown or Falmouth (at the option of the master) for orders, to be forwarded within forty-eight hours after notice of said arrival has been given to and received by charterers' agents in London or lay-days to count, to discharge at a good and safe port in the United Kingdom or on the Continent between Bourdeaux and Hamburg, both inclusive, or so near thereunto as she may safely get, and deliver the same in any dock freighters may appoint, always afloat, agreeably to bills of lading, on being paid freight in full of all port-charges,

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pilotage, and primage, at and after the rate of 60s. sterling per ton of 20 cwt. net delivered; the act of God, restraints of princes and rulers, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever during the said voyage always excepted. The freight to be paid on right delivery of the cargo, if at a port in the United Kingdom, in cash two months from the vessel's report inwards at the Custom House, or under discount at the rate of 5 per cent. per annum, at freighters' option; and, if on the Continent, on unloading and right delivery of the cargo, in cash at the exchange of the day, less two months' discount at the rate of 5 per cent. per annum. Twelve working laying days (Sundays excepted) are to be allowed the freighters for loading the said ship at port of loading and waiting for orders at port of call in Europe, to commence and to be computed twenty-four hours after the master has given notice in writing to charterers' agents that the ship is ready to receive cargo; and fifteen days on demurrage are allowed over and above the said laying days at 4*d.* per register ton per day. The homeward cargo to be received, when the vessel is at her place of discharge, with all possible dispatch and according to the custom of the port. All goods to be brought to and taken from alongside at the expense and risk of the freighters. The captain to sign bills of lading for his cargo at no lower rate of freight than stipulated in this charterparty; failing which, charterers shall not be responsible for such difference. The vessel to be consigned at ports of loading and discharge to charterers' agents free of commission under this charterparty. All questions of general average to be settled according to the custom of the London underwriters at Lloyds. Freighters to have the power of underletting the whole or part of the vessel.

Freighters to have the option of cancelling this charterparty if the vessel be not arrived at port of loading and be ready to take in cargo at or before noon of the 15th of April next ensuing retaining consignment; such option to be availed of within twenty-four hours after ship's arrival. It is further agreed that the liability of the charterers shall cease as soon as the cargo is on board, provided the same is worth the freight at port of discharge, but the owners of the ship to have an absolute lien on the cargo for all freight, dead freight, and demurrage, which they shall be bound to exercise: sufficient cash for ship's ordinary disbursements to be advanced the master by freighters' agents at port of loading, at the current rate of exchange, to the extent of 600*l.*, for the due appropriation of which freighters shall not be responsible: such advance to be on account of chartered freight, and to be indorsed on bills of lading, including cost of insurance and 2½ per cent. commission, and deducted from freight on settlement thereof. . . . . Penalty for non-performance of this agreement, estimated amount of chartered freight. A commission of 5 per cent. is due by the owners (ship lost or not lost) to Burot, Gerber, & Co., on signment of this charterparty; and the vessel is to be consigned to them, should she return to London, or to their agents if to any other port of discharge. 20*l.* gratuity to the master, provided the cargo is not delivered heated nor more than 3 per cent. thereof sea-damaged.

Averment, that the *Theresa* was loaded with a cargo of rice, and sailed to Falmouth; and that, on her arrival there, due notice of such arrival was given to and received by the defendants and their agents, and all times elapsed, all things happened, and all conditions were fulfilled to entitle the plaintiffs to have orders for the

Theresa to proceed to port of discharge given by the defendants or their agents, in accordance with the terms of the said charterparty: yet the defendants or their agents did not give and refused to give any orders as to the *Theresa's* port of discharge, in accordance with the terms of the charterparty; whereby and in consequence whereof the plaintiffs were delayed, prevented, and hindered from earning the freight on the *Theresa's* cargo payable under the charterparty, and incurred divers expenses in and about the unloading of the said cargo, and in endeavouring to obtain and in obtaining payment of the said freight.

There was a second count, alleging for breach "that the defendants or their agents did not give orders for the *Theresa's* port of discharge in accordance with the terms of the charterparty; and gave orders that the *Theresa* should proceed to and discharge at a port which was not a good and safe port within the meaning of the said charterparty, and where and as near whereunto as she could safely get she could not deliver the said cargo always afloat, or in any dock always afloat, according to the terms of the said charterparty;" whereby, &c. (as before).

There was also a count for money paid, money had and received, &c.

Fifth plea, that the charterparty was made subject to the condition therein contained that the liability of the defendants should cease as soon as the cargo was on board, provided the same was worth the freight at port of discharge, but the owners of the ship to have an absolute lien on the cargo for all freight, dead-freight, and demurrage, which they should be bound to exercise; that the cargo was shipped on board the said vessel, and before the arrival of the same was sold by the defendants; that the same was worth the freight at the port of discharge; and that by reason of the premises the defendants' liability upon and under the charterparty ceased.

Sixth plea, similar to the fifth, but adding that "the alleged breaches were caused by the acts of the buyers of the cargo, and not by the acts of the defendants."

Demurrer, on the ground that the facts stated in the pleas did not affect the defendants' liability under the charterparty. Joinder.

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Feb. 17. *French*, for the plaintiffs. It may be conceded that, if this had been an action for freight, dead-freight, or demurrage, the fifth and sixth pleas would have been good answers. But the breaches here are different from those in *Kish* v. *Cory*. (1) The breach alleged in the first count is, for not giving orders as to the port of discharge of the *Theresa*, whereby the plaintiffs were delayed and prevented from earning freight, and incurred expense in unloading the cargo and in obtaining payment of the freight; and that in the second count is, that the orders given were not in accordance with the terms of the charterparty, but were orders that the ship should proceed to a port which was not a good and safe port, whereby the plaintiffs were put to expense in earning the freight. Under the clause in question, the cesser of the charterers' liability is conditional and co-extensive only with the lien given. The sale by the defendants of the cargo without notice to the defendants did not relieve them of their liability to give orders for the ship's port of discharge; there being no agreement express or implied between the plaintiffs and the defendants that the liability of the latter to give such orders should cease on their selling the cargo, or that the buyers' liability should be accepted in substitution. See, as to the measure of damages for refusing or neglecting to name a safe port, *Stewart* v. *Rogerson*. (2)

Watkin Williams, Q.C., for the defendants. Delay or refusal to name a port of delivery comes strictly within the demurrage clause. Under such a clause as that in question, *all* liability of the charterer ceases on the cargo being loaded, as well in respect of future as in respect of antecedent liabilities, without regard to lien.

French was heard in reply.

Cur. adv. vult.

June 14. The judgment of the Court (Brett, Archibald, and Lindley, JJ.,) was delivered by

BRETT, J. In this case the judgment of the Court is to be given upon a record on which there are demurrers to two pleas, the fifth and sixth. We cannot doubt that, if the declaration is good, the pleas are bad. If the stipulation in the charterparty does not of itself upon the loading of the cargo absolve the defend-

(1) Law Rep. 10 Q. B. 553. (2) Law Rep. 6 C. P. 424.

ants in respect of the breaches relied on in the declaration, the other facts set forth in the pleas respectively cannot absolve them. The defendants are bound by the contract unless they are absolved by the contract. The real question, therefore, in this case is, whether the declaration is sufficient.

The material points to be noticed seem to be, that the defendants must be assumed to be the real freighters, that there is an implied contract by them that orders shall be forwarded to Queenstown or Falmouth, that time for the waiting of the ship for such orders is expressly allowed in the lay days, and that beyond the lay days, which include such waiting and the period of loading at the port of loading, fifteen days on demurrage are allowed at 4*d.* per register ton per day. The homeward cargo is to be received when the vessel is at her place of discharge with all possible dispatch and according to the custom of the port.

The breach in the first count is, for not giving any orders as to the port of discharge, whereby and in consequence whereof the plaintiffs were delayed, prevented, and hindered from earning the freight on the cargo payable under the charterparty, and incurred divers expenses in and about the unloading of the said cargo, and in endeavouring to obtain, and *in obtaining* payment of the said freight. The breach in the second count is, that the orders given were not in accordance with the terms of the charterparty, but were orders that the *Theresa* should proceed to and discharge at a port which was not a good and safe port within the meaning of the said charterparty, whereby &c. (the same consequences as in the first count).

The real grievance, then, complained of is, not that the plaintiffs did not earn the freight, but that they were delayed and put to expense in earning it by reason of two alleged breaches of the charterparty occurring at Falmouth. Even though the mere delay of the ship by not giving orders at Falmouth might be treated as subject to the demurrage rate, and therefore in such a charterparty as the present subject to the lien for demurrage, as suggested by some of the judges in *Kish* v. *Cory* (1); yet the other damages sued for cannot, we think, be brought within such a rule. A part of the damages sued for are obviously unascertained or unliquidated

(1) Law Rep. 10 Q. B. 553.

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damages. For such part there is no lien; such part is not the "freight, dead-freight, or demurrage," for which a lien is given in this charterparty.

The question therefore is, whether, in the case of a charterer who is himself the real principal, the clause under discussion absolves from breaches occurring after the loading of the ship in respect of which no remedy is given against the consignees; or, in other words, whether, upon such a charterparty, the ship-owner must be held to have agreed to make no claim for damages for omissions occurring after the loading of the vessel which but for the clause would give him a right to damages. If the latter be the true construction, the result is that, upon such charterparties as the present, the ship-owner, in order to secure freight as on a full cargo, and compensation for delay strictly to be called demurrage delay, and perhaps for further delay giving damages in the nature of demurrage delay, occurring before or during the loading of his ship, undertakes the risk of all defaults of the charterer or his agents happening after the ship is loaded.

So far as the damages which are claimed are covered by the lien, we think there can be no doubt that the charterers are absolved. The question is as to the part of the damages which is not so covered. The rule must be deduced from, or, at all events, cannot properly be declared without considering, the decided cases. The question has always been whether the liability sued for was one of those which was to cease as soon as the cargo was on board: see *Oglesby* v. *Yglesias* (1): and, in *Milvan* v. *Perez* (2), the liability sued for occurred before or during the loading; but the clause was in terms applicable to "all matters and things *as well before as after* the shipping of the said cargo." It was, therefore, held that the charterers were by express terms absolved upon the loading in respect of all liabilities, whether they occurred before or after the loading; and this without reference to whether the liability was or was not transferred to the consignees by the medium of a right of lien given to the ship-owner: for, in the first case, the claim was for demurrage, but in the second was for damages for not loading in regular turn or in a reasonable time.

(1) E. B. & E. 930; 27 L. J. (Q.B.) 356.

(2) 2 E. & E. 495; 30 L. J. (Q.B.) 90.

In *Bannister* v. *Breslauer* (1), the claim was for not loading with all dispatch or within a reasonable time. The clause was, "The charterer's liability to cease when the cargo is shipped, provided the same is worth the freight on arrival at the port of discharge; the captain having an absolute lien on it for freight, dead-freight, and demurrage," &c. The defendants were not said to be agents. The Court held that the clause absolved the defendants. But it cannot be denied that the case has been since doubted, on the ground that apparently no lien was given for the damages sued for. In *Pedersen* v. *Lotinga* (2), the claim was for delay in loading. The clause was, that "the charter being concluded by the charterer on behalf of another party, it is agreed that all liability of the former shall cease as soon as he has shipped the cargo, the owners and master agreeing to rest solely on their lien on the cargo for freight and demurrage." The Court held that the defendants were not absolved in respect of the liability for delay in loading, and that the clause absolved only from future liabilities. In *Gray* v. *Carr* (3), in error, the second part of the clause was in question. The action was against the consignee as upon a lien for dead-freight and demurrage and detention at the port of loading. It was held that a lien was given for demurrage, but that no lien was given for the damages occasioned by detention at the port of loading beyond the demurrage days. The clause, therefore, as to the absolution of the charterer, must be construed subject to such decision as to the limits of the lien against the consignee. In *Christoffersen* v. *Hansen* (4), the clause was for delay in loading. It was assumed that no lien was given for such delay. It was held that *consequently* the true construction was that the charterer, though in fact an agent, was only absolved from liability which might accrue after the loading, and was not absolved from liability for delay in loading In *Francesco* v. *Massey* (5), the claim was against the charterers, as principals in fact, for five days demurrage and damages for fourteen days further detention at the port of loading. The liability for the detention was admitted; but it was argued that, *because there was a lien for the demurrage against*

(1) Law Rep. 2 C. P. 497.
(2) 28 L. T. 267.
(3) Law Rep. 6 Q. B. 523.
(4) Law Rep. 7 Q. B. 509.
(5) Law Rep. 8 Ex. 101.

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the consignee, the true construction was that the charterer was absolved in respect of it, although it was antecedent to the loading. And the Court held for the defendants. In *Lister* v. *Van Hansbergen* (1) the claim was for delay in loading. It was held that the clause did not absolve the charterers. In *Kish* v. *Cory* (2), in error, the claim was for demurrage at the port of loading. It was held that the clause absolved the charterer, though principal in fact. The Court approved of the decision in *Francesco* v. *Massey* (3), and held that the absolution applied to past liabilities, where a lien was given in respect of them. The inclination of many of the judges, in face of the increasing number of such charterparties made in ordinary course of business, seemed to be to extend the lien rather than to diminish the absolution.

In all the cases, then, it will be seen, the dispute has been as to the extent of the absolution in respect of liabilities accruing before the loading; in every case it has been assumed or expressly declared that it is complete as to liabilities which might otherwise accrue after the loading. The words of the clause must necessarily absolve from all future liability, or mean nothing.

The rule, therefore, seems to be, that, where the words of the absolving part of the clause plainly shew that *all* liability is to cease on loading, it is so to cease both as to antecedent and future liabilities, and without regard to any lien; but, where the words of the absolving part are open to either interpretation, then, without regard to lien, liability as to future transactions is not to accrue, but liability as to antecedent breaches is to cease only so far as an equivalent lien is given.

It follows that, in the present case, the defendants are absolved by the clause in respect of all the damages sued for, whether a lien be or be not given as to part of them. Judgment on the whole record must therefore be given for the defendants.

Judgment for the defendants.

Solicitors for plaintiffs: *Vizard, Crowder, & Co., for Yates, Son, & Co., Liverpool.*

Solicitors for defendants: *Hollams, Son, & Coward.*

(1) 1 Q. B. D. 269. (2) Law Rep. 10 Q. B. 553.
(3) Law Rep. 8 Ex. 101.

[IN THE COURT OF APPEAL.]

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June 26.

KEAY AND ANOTHER *v.* FENWICK AND OTHERS.

Shipping—Authority of managing Owner—Liability of Co-owners—Commission on Sale of a Ship—Construction of Power of Attorney.

D., the managing owner of a ship, through the plaintiffs, his agents at Constantinople, sold her to the Turkish Government, and received a bill upon the Oriental Bank in London for the amount of the purchase-money, which bill was duly paid. D. had no express authority at the time from the defendants (who were the owners of 23/64ths of the ship) to sell her, but the latter knew that a sale was contemplated; and, after the sale, they executed a power of attorney, reciting that they had agreed to sell the vessel to the Turkish Government, and had actually received the purchase-money, and impowering the plaintiffs to transfer their respective shares and to hand over the vessel to the purchasers. The defendants afterwards received from D. (or settled in account with him) the value of their respective shares:—

Held, that the jury were warranted in finding that the defendants had authorized the sale of the ship by D., or had by their subsequent ratification so adopted his act as to render them jointly liable to the plaintiffs for the commission due to the latter on the sale.

Held also, that the position of the defendants was not so altered by the fact of the plaintiffs having drawn upon D. a bill at three months' date for the amount of the commission, as to release the former from liability upon the dishonor of the bill.

THIS was an action brought by the plaintiffs, who are shipping-agents and merchants carrying on business at Constantinople, to recover against the defendants, who were joint owners with one Dale (who acted as managing owner) of a screw steam-ship called the *Westminster*, to recover the sum of 511*l.* 18*s.* 3*d.*, the balance of a claim of 731*l.* 6*s.* for commission on the sale of that vessel to the Ottoman Government through their intervention in April, 1874.

The cause was tried before Lindley, J., at the sittings in Middlesex after Trinity Term, 1875. The facts were as follows:—

The defendants and Dale were joint owners of the *Westminster*, and Dale and certain other persons were joint owners of another steam-ship called the *Buckingham*. These two vessels being at Constantinople, Dale, in January, 1874, acting as managing owner

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of both, through the intervention of the plaintiffs as his agents at that place, entered into negotiations with an agent of the Turkish Government for the sale of them, and ultimately, on the 19th of that month sent to the plaintiffs a telegram authorizing the plaintiffs to sell the *Westminster* for 19,000*l.*, which they accordingly did on the 30th of that month, remitting to Dale at North Shields a bill upon the Ottoman Bank, London, payable at thirty days' sight. The plaintiffs about the same time also sold the *Buckingham*. The agreed commission they were to receive for the two was 1550*l.*, 718*l.* 5*s.* 10*d.* of which was to be appropriated to the *Westminster*, and the rest to the *Buckingham*. For this sum (718*l.* 5*s.* 10*d.*) and some other charges (amounting altogether to 731*l.* 6*s.*) the plaintiffs on the 4th of April, 1874,—which was after they had ascertained who the owners were,—drew upon P. Dale & Co. of North Shields a bill at three months, which was accepted by Dale in the name of his firm: but, before its maturity, Dale filed a petition under s. 125 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), for a liquidation by arrangement, in the Newcastle County Court; and at the first meeting of his creditors held on the 22nd of July, the statutory number of his creditors agreed to accept a composition of 6*s.* 8*d.* in the pound on the amount of their respective debts, payable as follows, viz. 3*s.* in the pound one month after the filing of the resolution, 3*s.* in the pound three months later, and 8*d.* in the pound at the expiration of twelve months from the last-mentioned date. The plaintiffs were parties to this arrangement in respect of the acceptance for 731*l.* 6*s.*, and received the composition.

Dale paid a portion only of the 19,000*l.* purchase-money over to his co-owners; one of the defendants, Stanley, receiving 1100*l.* in cash and Dale's acceptance for 1400*l.* at six months' date, being 2500*l.*, his proportion of the purchase-money, less a sum claimed by Dale as charges on the ship; this acceptance, however, was dishonored at maturity. The other defendants received their respective shares of the purchase-money from Dale, or settled for the same in account with him.

At the time of effecting the sale of the *Westminster*, the plaintiffs did not know that the defendants were part-owners, and the

sale was effected without the express authority of the defendants: but, their assent to the transfer being necessary, they afterwards, on the 19th of February, 1874, executed a power of attorney in the following terms:—

To all to whom these presents shall come, we George Dryden Dale, of North Shields, ship-owner, John William Fenwick, of the same place, solicitor, Frank Stanley, of Newcastle-upon-Tyne, gentleman, and Pearson Armstrong, of the same place, solicitor, send greeting: Whereas we the said several persons are the registered owners of the screw steam-ship *Westminster*, of Shields, as appears by a certified copy of the register of the said vessel hereunto annexed, under the hand of Henry Lindsay, collector of customs at the port of Shields, which said vessel is now at Constantinople: And whereas we have agreed to sell the said steam-vessel to the Turkish Government, and have actually received the purchase-money, we are desirous of appointing the hereinafter-mentioned attorneys to sign, seal, and execute the necessary bill of sale or transfer of our shares of and in the said vessel to the Turkish Government aforesaid: Now, know ye that we the said G. D. Dale, J. W. Fenwick, Frank Stanley, and P. Armstrong do and each and every of us doth hereby constitute and appoint Messrs. Keay & Donald, steam shipping agents at Constantinople, and each partner in that firm jointly and separately, our and each of our true and lawful attorneys and agents, attorney and agent, for us and every of us to sign, seal, and execute any bill of sale or document necessary for the purpose of assigning or transferring our shares in the said screw steam-ship *Westminster* to the Turkish Government or to whom they may appoint: and, in case the said steamer has not yet been delivered over to the purchasers, we hereby authorize and impower our said attorneys or agents to hand the same over together with her boats and appurtenances, and generally in the premises to do, perform, execute, and accomplish all such acts, deeds, matters, and things whatsoever as our said attorneys or any of them shall judge, see, or think fit or necessary to be done in the premises, as fully and effectually as we the said constituents might or could do were we personally present: And we the said constituents and each and every of us do ratify, confirm, and hold for good, effectual, and valid in law all and whatsoever our and each of our said attorneys or any of them shall lawfully do or cause to be done in and about the premises by virtue of these presents. In witness, &c.

On the part of the defendants it was contended that Dale had no authority to sell the ship, that they never ratified the sale, that the plaintiffs had looked to Dale alone for payment and had so dealt with him as to have discharged the defendants even if they had ever been liable to the plaintiffs, and that the position of the defendants had been altered, to their prejudice, by settling their acounts with Dale before notice of the claim of the plaintiffs. On the part of the defendant Armstrong it was further contended that he was only a mortgagee of certain shares and not a part-owner of the ship, and therefore could in no event be liable.

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The learned judge put the following questions to the jury,—

1. Did the defendants authorize their co-owner Dale to sell the ship on the terms that the owners should pay a commission?

2. Did Dale sell the ship through the plaintiffs, and agree with them that the owners should pay them a commission? and did the defendants ratify the sale of the ship on those terms?

3. Did the plaintiffs look exclusively to Dale for the payment of their commission?

4. Did the defendants Fenwick and Stanley or either of them alter their position by settling their accounts with Dale before notice of the plaintiffs' claim, so as to make it unjust for the plaintiffs to require the defendants to pay them?

5. Was the defendant Armstrong a part-owner or a mortgagee only?

The first and second of these questions were answered by the jury in the affirmative, and the third and fourth in the negative: and in answer to the fifth they found that Armstrong was a part-owner.

The learned judge thereupon directed a verdict to be entered for the plaintiffs.

Benjamin, Q.C., on behalf of the defendant Fenwick, at the last Michaelmas sittings, obtained a rule nisi to set aside the verdict as against him, and to enter a nonsuit, or a verdict for him or all the defendants, or for a new trial, on the following grounds,—1. that there was no evidence of the contract sued upon, or ratification thereof as between the plaintiffs and defendants,—2. that the verdict was against the weight of evidence on some or all of the questions left to the jury,—3. that the judge ought to have directed the jury that the plaintiffs, by receiving Dale's acceptance for the amount claimed by the plaintiffs after knowledge of the names of the principals and without notice to them, had elected to trust the agent, and could not afterwards hold liable principals then disclosed,—4. that the judge ought to have ruled that there was no evidence of a joint contract,—5. that the plaintiffs, by allowing the defendants to give credit to Dale in account for commissions as if paid by him, and neglecting to notify the defendants of their claim for commission till after Dale's bank-

ruptcy, had so altered the position of the defendants as to disentitle the plaintiffs to recover in this action.

Herschell, Q.C., obtained a similar rule on behalf of the defendant Stanley.

Wilberforce also obtained a rule on behalf of the defendant Armstrong, with an additional ground, viz. that Armstrong, being a mortgagee only, could not in any event be liable to the plaintiffs for commission on the sale of the ship.

Feb. 4. *Butt, Q.C., Cohen, Q.C.*, and *Witt*, shewed cause. They contended that, although Dale might have had no original authority to sell the ship, yet the defendants, who were all part-owners, were willing that she should be sold, ratified the sale as soon as they had notice of it, executed the power of attorney giving Keay & Donald authority to execute the transfer to the Turkish Government, and received from Dale their respective shares of the purchase-money; that the defendants were all jointly liable to pay the commission which they must have known would be payable to some one, and they settled their separate accounts with Dale upon the footing that it had actually been paid; and that the drawing of the bill upon Dale was no evidence of an election on the part of Keay & Donald to deal with Dale alone in the matter, it being a common and usual course of business to settle the ship's accounts with the ship's husband or managing-owner. [The following authorities were referred to,—*Paterson* v. *Gandasequi* (1); *Bottomley* v. *Nuttall* (2); *Whitwell* v. *Perrin* (3); *Hunter* v. *Parker* (4); *Calder* v. *Dobell* (5); *Armstrong* v. *Stokes* (6); *Heald* v. *Kenworthy.* (7)]

Benjamin, Q.C., and *F. M. White*, for Fenwick, *Herschell, Q.C.*, and *Shield*, for Stanley, and *Day, Q.C.*, and *Wilberforce*, for Armstrong, in support of the rules, submitted that there was no evidence of prior authority in Dale to sell the ship; that, though the signing the power of attorney might amount to a ratification of the sale of the ship, it could not amount to a ratification of a contract to pay commission of which they knew nothing, so as to make each

(1) 15 East. 65.
(2) 5 C. B. (N.S.) 122; 28 L. J. (C.P.) 110.
(3) 4 C. B. (N.S.) 412.
(4) 7 M. & W. 322.
(5) Law Rep. 6 C. P. 486.
(6) Law Rep. 7 Q. B. 598.
(7) 10 Ex. 739, at p. 745; 24 L. J. (Ex.) 76.

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co-owner liable for the whole; that the authority to sell (if any) was an authority by each part-owner to sell his share, and the ratification (if any) could go no further; that co-owners, though partners as to the particular adventure, were not joint-owners of the ship, but owners only of their respective shares; that the power of attorney merely entitled Keay & Donald to do what each of the part-owners could do, viz. transfer each his own shares in the ship; and that taking a security from Dale for the balance of the commission so altered the position of the defendants as to discharge them from any liability they might otherwise have incurred, and the finding as to this was against the weight of evidence. An additional argument urged on behalf of Armstrong was, that, though in other respects in the same position as the other defendants with regard to the question of ratification of the sale, he was not in fact a part-owner, but only mortgagee of certain shares in the ship, and that the money which he received was the amount of his mortgage debt and interest only, and was received by him before he executed the power of attorney.

Cur. adv. vult.

Feb. 28. The judgment of the Court (Lord Coleridge, C.J., and Denman and Lindley, JJ.,) was delivered by

LINDLEY, J. This was an action in which the plaintiffs, who were ship-brokers at Constantinople, sought to recover from the defendants, as owners of the steam-ship *Westminster*, the sum of 511*l.* 18*s.* 3*d.*, being the balance of the plaintiffs' account against the owners of the ship. The main point in dispute was whether the plaintiffs were entitled to be paid by the defendants a sum claimed by the plaintiffs as commission on the sale of the ship to the Turkish Government.

The ship was in fact, on the instructions of Dale, sold by the plaintiffs to the Turkish Government for 19,000*l.* Dale was one of the owners of the ship,—the managing owner. The price was paid by means of a bill; and this bill was sent to Dale by the plaintiffs, they at the time knowing nothing of the defendants. Dale divided this sum, less certain deductions for commission and other matters, amongst the defendants and himself. Afterwards, and after the plaintiffs had ascertained who the owners were, the

plaintiffs drew a bill on Dale for the balance due to them, including their commission; and he accepted the bill. He subsequently became bankrupt, and the plaintiffs proved against his estate for the amount of the bill, and received a dividend on it. The sum sought to be recovered in this action was the amount of the bill, less the dividend.

The defendants contended that Dale had no authority to sell the ship; that the defendants never ratified the sale; that the plaintiffs had looked to Dale alone for payment, and had so dealt with him as to have discharged the defendants, even if they had ever been liable to the plaintiffs. One of the defendants, Armstrong, further contended that he was only a mortgagee of the ship, and not a part-owner.

The jury found, in answer to questions left to them by the judge at the trial, that the defendants did authorize their co-owner, Dale, to sell the ship on the terms that the owners should pay a commission; that he did sell her (through the plaintiffs) on those terms; that the defendants ratified such sale; that the plaintiffs did not look exclusively to Dale for payment; that the defendants had not altered their position by settling their accounts with Dale before notice of the plaintiffs' claim, so as to make it unjust for the plaintiffs to require the defendants to pay them; and that Armstrong was an owner, and not a mortgagee.

On these findings the plaintiffs had a verdict. Rules were obtained to set aside this verdict as against the defendant Fenwick, and to enter a nonsuit or a verdict for him or all the defendants, or for a new trial, on the following grounds,—1. That there was no evidence of the contract sued upon, or ratification thereof as between the plaintiffs and defendants,—2. That the verdict was against the weight of evidence on some or all of the questions left to the jury,—3. That the judge ought to have directed the jury that the plaintiffs, by receiving Dale's acceptance for the amount claimed by the plaintiffs after knowledge of the names of the principals and without notice to them, had elected to trust the agent, and could not afterwards hold liable principals then disclosed,—4. That the judge ought to have held that there was no evidence of a joint contract,—5. That the plaintiffs, by allowing the defendants to give credit to Dale in account of commissions as

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if paid by him, and neglecting to notify the defendants of their claim for commissions till after Dale's bankruptcy, had so altered the position of the defendants as to disentitle the plaintiffs to recover in this action. Similar rules were obtained on behalf of Stanley and Armstrong; the latter stating an additional ground, viz.,—6. That the defendant Armstrong, being a mortgagee only, was not liable to the plaintiffs for commission on the sale of the ship.

The jury were, perhaps, hardly justified in finding that an authority to sell was given by the defendants to Dale before the ship was sold: but, in all other respects, we think there was ample evidence to support their findings. The evidence of ratification consists mainly of the power of attorney signed by all the defendants, and dated the 19th of February, 1874, and of the division of the money realized by the sale. The power of attorney was as follows:—[The learned judge read it.]

It was contended first of all that this was not a joint authority, but only an authority from each defendant to sell his own shares, and that the authority could not in point of law amount to anything else. But, although it is true that each of several co-owners of a thing can only sell or authorize the sale of his own interest in that thing, yet it is also true that all the co-owners of a thing may combine and sell or authorize the sale of that whole thing: and this is really what the defendants did. The authority they conferred was one authority given by them all collectively to sell the whole ship, and not several authorities given by them separately to sell their respective shares in her.

There is no legal principle or rule which precludes several co-owners from jointly retaining a solicitor to bring or defend an action relating to their common property: nor is there any reason why several co-owners of property may not act jointly in respect of it. Whether they have done so or not in any particular case, must depend on the circumstances of that case. In this case the jury found that the defendants had so acted; and we think that the jury were quite right in coming to this conclusion.

It was contended, secondly, that, even if the defendants did ratify the sale of the ship, they did not ratify her sale on commission. But the defendants knew that Dale was in England, and

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that the ship was sold in Constantinople, and that, in the ordinary course of business, she could only be sold by some agent, and that agent would require to be paid. A ratification of the sale was a ratification of a sale in the ordinary course of business; and it is not competent for the defendants to ratify part of the transaction and repudiate the rest.

Great stress was laid by the defendants on the fact that Dale sold two ships to the Turkish Government through the plaintiffs, and that the defendants were only interested in one of them; and that the commission sought to be recovered in this action was fixed by Dale and the plaintiffs after the power of attorney was given, and by apportioning the commission for the sale of the two ships between them both. But there was no evidence to shew that the commission sought to be recovered was improper or unusual in amount; and consequently the time at which the precise amount was settled, and the mode by which such amount was arrived at, are not, we think, material elements in the case.

It follows from what we have said, that the defendants became jointly liable with Dale for the payment to the plaintiffs of the commission claimed by them.

It remains to be considered how this liability has been got rid of. *Bottomley* v. *Nuttall* (1) shews that the mere facts that the plaintiffs, knowing that the defendants were co-owners of the ship with Dale, took a bill from him for the amount due to them, and proved against his estate in respect of such bill, are not necessarily sufficient to discharge the defendants. The only additional facts were, that the defendants had received from Dale moneys on account of their shares of the sum of 19,000*l.* realised by the sale of the ship. But none of the defendants had really altered his position for the worse by so doing; none of them had by finally settling any account with him or otherwise discharged him from any liability which he may have been under to them. Armstrong, indeed, discharged him from all liability; but Armstrong got paid everything which he claimed to be due to him. The jury were, therefore, fully warranted by the evidence in coming to the conclusion that none of the defendants had so altered his position as to render it unjust on the part of the plaintiffs to have recourse to

(1) 5 C. B. (N.S.) 122; 28 L. J. (C.P. 110.

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him. Even if one of the defendants had so altered his position, we are by no means sure that this circumstance would have afforded a defence to the action: for, this is not the simple case of an agent acting for an undisclosed principal; it is a case where the agent, being an owner, is liable with his undisclosed principals who are his co-owners; and it may well be that a dealing with him which would discharge the others if they were not liable jointly with him, might not have that effect if they were. Such a dealing might be more analogous to a covenant not to sue than to a release.

As regards Armstrong's position, he represented himself to the plaintiffs as owner, and not as mortgagee; he was registered as owner, and a copy of the register was sent to the plaintiffs with the power of attorney: and, even if Dale could in equity have successfully contended, as against Armstrong (who it must be remembered was his own solicitor), that the instrument of the 12th of February, 1872, was a mortgage and not a sale, still Armstrong joined in the power of attorney as an owner, and cannot be heard now to deny that he was what he therein represented himself to the plaintiffs to be. Whether he was in fact mortgagee or owner, he joined the other defendants in ratifying the sale, and rendered himself jointly liable with them for what Dale had done for the common benefit of all.

The items in the account relating to other matters besides commission are properly chargeable against the defendants as owners of the ship; for, the ratification by them of her sale at Constantinople involves a ratification of her voyage there from Malta, and also a ratification of the discharge of her crew when she was handed over to the Turkish Government. The items in question were for advances properly made for the purposes of such voyage, and for paying off the dismissed crew.

All the rules, therefore, will be discharged, with costs.

Rules discharged.

The defendants appealed against this judgment: and the appeal was argued before James and Mellish, L.JJ., and Baggallay, J.A., on the 26th of June, 1876. The same counsel appeared for the respective parties as in the Court below, and the arguments urged were substantially the same.

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JAMES, L.J. I am of opinion that the judgment of the Common Pleas Division in this case should be affirmed. Upon the evidence and the findings of the jury upon the several questions put to them, we have to consider whether there is any rule of law that the questions should not have been so left or ought not to have been so found. The first in effect is whether in selling the ship the plaintiffs acted under a joint employment or joint retainer of the co-owners. The plaintiffs, who were the agents of the ship at Constantinople, received instructions from Dale, the ship's husband, to sell her for a satisfactory price. The employment of the agents was an employment to do something for the owners. They could not have supposed they were acting upon the sole responsibility of Dale. They were authorized to sell for the owners of the ship, all of whom knew that a sale was in contemplation. Dale gave instructions for the sale, because he knew that his co-owners did not object to a sale: and all of them joined in a power of attorney to enable the agents at Constantinople to convey their respective shares to the purchaser, and each received his share of the purchase-money. That is as complete a ratification as could be of the sale; and it follows that all the co-owners were liable for the commission payable on the transaction. I think the jury might well find that there was an authority to sell; and at all events that there was a complete ratification of the acts done for the benefit of all the co-owners. It seems to me that there was a joint authority to sell, and a joint obligation to pay the commission due upon the sale; and that there was no defence to the action. Then, was that which afterwards took place between Dale and the plaintiffs a legal release of the joint liability? No authority has been cited to shew that taking a bill by which time is given from one of several joint debtors discharges the others. I can see no distinction in this respect between partners and joint-contractors. The taking a bill from Dale for the balance of the commission, therefore, clearly was no legal release of the liability of his co-owners. If not, the third question was properly put and properly answered by the jury. Then, was there any such dealing between the plaintiffs and Dale as did or could alter the position of the defendants or either of them? The jury found there was not; and I entirely agree with them. There

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was no evidence that the drawing of the bill by the plaintiffs upon Dale (which was unknown to the defendants) induced either of them to alter his position in any respect. Upon that the finding of the jury is conclusive.

MELLISH, L.J. I am of the same opinion. Having regard to the terms of the power of attorney, I think it is impossible to say that there was not a joint authority by all the part-owners to sell the ship. They all knew beforehand that the ship was about to be sold. They were all anxious to get rid of her if a good price could be obtained for her. I think the jury were perfectly well warranted in finding that there was prior authority in Dale to sell the ship. But, when we come to look at the power of attorney by which the plaintiffs, the agents at Constantinople, were authorized by all the part-owners to convey their respective shares, it seems to me to be impossible to doubt that all jointly authorized the agents to execute a transfer, and all were liable for their commission. The fact of part of the commission being paid by a bill on Dale can make no difference. That is not an unusual way of making payments by a ship's husband. He could hardly pay in any other way. Having left the mode of settlement to Dale, the co-owners are bound by his acts. As to Armstrong, the evidence as to his actual position was, to say the least of it, ambiguous. The jury found that he was a part-owner; and the question was entirely for them.

BAGGALLAY, J.A. I am of the same opinion. It is immaterial to consider whether or not there was an original authority given by all the co-owners to Dale to sell the ship, because we are all agreed that there was a complete and clear recognition of the sale and transfer by the power of attorney. It is impossible to read the terms of that instrument without seeing that it is a recognition of a joint liability to pay the commission due upon the sale. Indeed, it was almost admitted in argument that that would have been so if no bill on Dale had been drawn. Can the mere fact, then, of Dale having given his acceptance for a part of the commission, which was dishonored when due, release the defendants from their liability? *Bottomley* v. *Nuttall* (1) is a distinct

(1) 5 C. B. (N.S.) 122; 28 L. J. (C.P.) 110; S. Jur. N.S., 315.

authority to shew that that can make no difference. Then it is said that the surrounding circumstances shew that the dealings between the plaintiffs and Dale altered the position of his co-owners to their prejudice. That was essentially a question for the jury; and they were unanimously of opinion that there were no such circumstances. I cannot doubt that they came to a proper conclusion.

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QUAIN, J. I am entirely of the same opinion.

Judgment affirmed.

Solicitors for plaintiffs: *Pritchard & Sons.*
Solicitors for Fenwick: *Stibbard & Cronshey.*
Solicitors for Armstrong: *Belfrage & Middleton.*
Solicitors for Stanley: *Pyke, Irving, & Pyke.*

[IN THE COURT OF APPEAL.]

June 1.

WILLIAMS AND OTHERS *v.* THE NORTH CHINA INSURANCE COMPANY.

Marine Insurance—Ratification with Knowledge of Loss—Valued Policy—Opening Valuation.

Where a policy of marine insurance is made by one person on behalf of another without authority, it may be ratified after the loss of the thing insured by the party on whose behalf it is made, though he know of the loss at the time of such ratification.

Where there was a valued policy on "freight":—

Held, that the rule that the valuation in a valued policy is conclusive did not prevent the Court from looking into the elements of which the valuation was made up to ascertain whether the freight intended to be so valued was the full freight, or the freight after deducting certain advances made against freight by the charterers' agents to the captain, such question becoming material for the purpose of ascertaining whether the shipowner was interested in the whole of the subject-matter of insurance, and whether to any extent the loss had been satisfied under another policy of insurance effected by the charterers on the said advances against freight.

APPEAL from the judgment of the Common Pleas Division in favour of the plaintiffs.

Declaration, first count, on a policy of insurance expressed to be on "estimated amount of freight valued at 69,807 guilders and 44 cents," i.e. 5941*l.* 1*s.* 2*d.*, the freight of the ship *Queen of the*

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Colonies, on a voyage from one or more ports in Java to Falmouth, for orders, and from thence to a port in the United Kingdom, or on the Continent of Europe between Havre and Hamburg. Money counts.

Pleas to the first count denying the insurance, the interest of the plaintiffs in the subject-matter of insurance, and the loss by the perils insured against, and a plea that the same subject-matter of insurance had been insured by the plaintiffs in other policies, and that the underwriters of such other policies paid to the plaintiffs a large sum, and the plaintiffs thereby became satisfied and indemnified for the loss.

To the money counts, never indebted and payment.

Issues thereon.

At the trial, before Denman, J., at the Michaelmas sittings, 1875, in London, the facts were admitted to be as follows:—

The plaintiffs were the owners of a ship called the *Queen of the Colonies*, which was managed for them by a firm called Smith, Bilborough, & Co. The ship had been chartered at a freight of 3*l.* 10*s.* per ton for a voyage from Batavia, in Java, to ports in Europe, and the charter provided that the ship was to be addressed to the charterers' agent at the port of loading and discharge, paying one commission of 2½ per cent. in all. It also provided that sufficient cash, not exceeding 600*l.*, was to be advanced against freight if required at ports of loading, subject to insurance and 2½ per cent. commission.

The charterer assigned the charterparty to a firm called Lorrain & Co. Lorrain & Co. loaded the ship at two ports in Java, through Abraas & Co., their agents at those ports. Before the vessel sailed Abraas & Co. submitted the disbursement account to the captain of the ship, and he signed it as correct. This account was as follows:—

	£	*s.*	*d.*
"To cash, per receipt, f. 1920·58, at the rate of 11·60 per £	165	11	4
„ 2½ % commission on £5796 3*s.* 2*d.* . .	144	18	0
„ 3 % insurance on £5941 1*s.* 2*d.* . .	178	4	7
	£488	13	11"

This account was forwarded to Messrs. Lorrain & Co. by Messrs. Abraas & Co. On receipt of it, Lorrain & Co. wrote a letter on the 19th of October, 1874, to Abraas & Co., complaining that the accounts were not correct, and proceeding as follows:—

"Ship's disbursements a/c. Was the 3 % insurance on the 5941*l.* 1*s.* 2*d.*=178*l.* 4*s.* 7*d.*, done by request and on account of the captain, as being entirely in the interest of his owners? If so, then you should have charged the ship with

	£ s. d.	£ s. d.
"Cash per receipt . .	165 11 4	
3 % insurance on freight .	178 4 7	
		343 15 11
2½ % commission on £343 15*s.* 11*d.*, due L. & Co. per charterparty . . .		8 11 11
Ditto, address commission . . .		144 18 0
3 % marine insurance on total advance, £512 13*s.* 5*d.*		15 7 7
		£512 13 5

"If, however, the above item is intended to represent the marine insurance on advances to ship a/c of freight, then of course it is wrong, and the a/c should have stood thus:—

	£ s. d.
"Cash advanced	165 11 4
Our 2½ % address commission on £5796 3*s.* 2*d.*	144 18 0
" " " £165 11*s.* 4*d.* (cash advanced)	4 2 9
3 % marine insurance on £324 6*s.* 8*d.* . .	9 14 7
	£324 6 8

"Please let us know at once which is right, as we must provide for insurance on whatever has been advanced."

Messrs. Lorrain & Co. also telegraphed to Abraas & Co. on the 3rd of November as follows: "Was it clearly understood by Captain Jones that we must insure his whole freight money for him?"

Messrs. Abraas & Co. replied to the letter of the 19th of October, that it would be difficult to alter the account of the

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Queen of the Colonies, seeing that it had been approved and signed by the captain.

Lorrain & Co. wrote on the 9th of November, 1874, to Abraas & Co. as follows:—

"We have your letters of the 23rd and 26th ultimo, contents of which are noted; but we regret that you have given us none of the explanations asked for in our respects of the 19th idem. Still hesitating to do the very unusual thing of insuring an estimated freight, and feeling that there might possibly be some misunderstanding on the matter, we wired you on the 3rd instant if it were distinctly intended that we were to do so, and the following afternoon we got your reply, 'Think it was Captain Jones's desire, as he approved and signed your note of charges,' leaving us where we were before. We were therefore obliged to accept the captain's account so far as it goes,

	£	s.	d.
Viz.	488	13	11
To which will have to be added per our letter of 19th	8	11	11
And	15	7	7
	£512	13	5

insuring both freight and advance, and holding you answerable for the two latter amounts in case we fail to recover the same from the owner, who may repudiate the captain's account, same not being in accordance with the terms of the charterparty."

Messrs. Lorrain & Co. effected the policy upon which the action was brought on the 9th of November. The ship was totally lost on the 25th of January, 1875, with her cargo; after the loss, and with knowledge of it, the plaintiff's agents Smith, Billborough, & Co. wrote to the insurance brokers, in whose hands the policy was, as follows:—"We learn from the captain of our late ship that his charterers in Java, acting under his instructions, insured his freight and disbursements. These policies we incidently hear are in your possession. We beg to inform you that we are prepared to pay, in cash, the small amounts advanced to our captain in Java by the charterers of our ship for insurance and disbursements, and will then trouble you to hand over to us these policies, in which

no one but ourselves will have any interest." The policy sued upon was accordingly handed to the plaintiffs. Messrs. Lorrain & Co. effected a separate policy at Batavia, at the same time as they effected the policy sued upon, in the sum of 512*l.* 13*s.* 5*d.*, "advance against freight" with the defendants' company, the amount of which was paid by the company to them. The plaintiffs had insured the freight of the ship with various underwriters in London by different policies, dated respectively the 10th of April, 1874, and the 22nd of June, 1874, for various sums, amounting in the aggregate to 5500*l.* These underwriters paid to the plaintiffs the amounts for which they had respectively underwritten, and took in each case a receipt in the following form :—

"Received this day of and from the Insurance Company, the sum of *l.*, as and by way of purchase of our interest to that extent in respect of a total loss of freight under a certain policy of insurance effected for us with the North China Insurance Company on freight by the *Queen of the Colonies* from Java to a port in the United Kingdom or Continent, valued at 69,807 guilders and 44 cents, and bearing date the 5th day of November, 1874, with full power and authority to use our names in any proceedings that they may be advised to take for the recovery thereof, they indemnifying and saving us harmless from the costs of all such proceedings. And we undertake to treat such payment as a purchase to the extent of our rights against the North China Insurance Company for such loss, and to assign our right to that extent to the Insurance Company when called upon.

"Smith, Billborough, & Co."

On these facts the counsel for the defendants objected that the antecedent insurances in London covered all the freight that the plaintiffs intended to insure; that the insurance on which the action was brought was not authorized by the plaintiffs; that the insurance was never ratified by the plaintiffs so as to bind the defendants either as to time or circumstances; that the insurance was not intended by Lorrain & Co. when effected to be for the benefit of the plaintiffs; that if the defendants were bound, the whole subject-matter of the insurance was not at risk.

A verdict was entered by consent for the plaintiffs for the

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amount claimed in the declaration, subject to the opinion of the Court, with power to draw inferences, as to whether the plaintiffs or defendants were entitled to the verdict, and if the plaintiffs, for what amount. Judgment to be moved for.

A motion was subsequently made accordingly to enter judgment for the defendants, but the Court refused the application, and entered judgment for the plaintiffs for 441*l.* 1*s.* 2*d.*

Against this decision the defendants appealed.

Benjamin, Q.C., and *Cohen, Q.C.* (*Lanyon* with them), for the defendants. It is contended, in the first place, that Lorrain & Co. did not make this policy for the plaintiffs but to secure themselves from responsibility, and therefore the plaintiffs could not ratify it. Secondly, it is contended that the plaintiffs had no insurable interest in that portion of the freight which the sum now sought to be recovered represents, and that they have already been paid under the policies effected in England all that could otherwise be recovered under this policy. The policy is, no doubt, a valued policy, and the valuation in such a policy cannot be opened, but the question is, what was the subject of valuation, and it is clear that it is open to the underwriters to shew that the assured has no interest in a portion of the subject-matter so valued, or that he has been already indemnified under another insurance in respect of all that formed such subject-matter. It is obvious, looking to the facts of this case and the figures, that what was here the subject-matter of the valuation was the whole freight, including the advances, and not the freight deducting the advances. The shipowner, not being entitled to the full freight, but only the freight minus the advance, can only recover to the extent to which he was entitled. The portion of freight corresponding to the advances he had parted with to his agents, who have insured it independently, and have recovered the full amount of such insurance. It cannot be recovered twice over. Whatever may be the division of the interests among different parties, there can be but one recovery in respect of the same portion of the subject-matter of valuation. [They cited on this point *Irving* v. *Richardson*. (1)] Thirdly, there cannot be a ratification with

(1) 2 B. & Ad. 193

knowledge of the loss; it is a general principle of law that a person can only ratify when he is competent to make the contract which he ratifies. A person could not insure with knowledge of the loss; consequently he cannot ratify. It is true there are decisions in which ratification with knowledge of a loss has been held good, but these were not in a Court of Appeal, and so are not binding on this Court. [They cited on this point *Routh* v. *Thompson* (1), *Couturier* v. *Hastie* (2), *Hagedorn* v. *Oliverson* (3), *Jardine* v. *Leathley*. (4)] Fourthly, though the underwriters in England might recover contribution in a proper form of action they cannot recover in this action.

Butt, Q.C., and *J. C. Mathew*, for the plaintiffs. It is clear that the insurance was effected on behalf of the shipowners, for they were charged commission on the premium. With regard to the second point, it is contended that there is no power to go behind the valuation in the policy. If it was intended to cover the shipowner's interest, but by mistake there was included more than the value of his interest in making the valuation, still in the absence of fraud the valuation is conclusive. The question is, therefore, what was intended to be insured—the entire freight or the residue of the freight after deducting the advances. It is contended that the words of the instrument must be construed in their natural business meaning. The word "freight" in its natural business sense would not include the advances which were not at the shipowner's risk, but the shipowner's interest only, viz. what was to be paid on the delivery of the cargo. If this was what was insured, the fact that by mistake the advances were not deducted in making the valuation is immaterial. It was a mere case of overvaluation, which in the absence of fraud could not be opened. [They cited on this point *Barker* v. *Janson* (5), *Lidgett* v. *Secretan*. (6)] Thirdly, the ratification of the policy by the plaintiffs was good, though it took place with knowledge of the loss. The authorities to that effect are of too long standing to be overruled. Fourthly, the plaintiffs are suing as trustees for the underwriters, to whom the policy was assigned.

(1) 13 East, 274.
(2) 8 Ex. 40; 22 L. J. (Ex.) 97.
(3) 2 M. & S. 485.
(4) 3 B. & S. 700; 32 L. J. (Q.B.) 133.
(5) Law Rep. 3 C. P. 303.
(6) Law Rep. 5 C. P. 190; 6 C. P. 616.

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COCKBURN, C.J. I think the judgment must be reversed. The first question is, whether this policy was effected on behalf of the shipowners in this country. I can come to no other conclusion than that it was. Messrs. Lorrain & Co. protected themselves in respect of the advance on freight and their commission by a separate policy; but they were in this position. Their agent at Java had, in an account stated with the captain of the ship, charged the captain with the amount of premiums payable for the insurance not only of the freight still remaining due, but of the whole freight, including the advances. Messrs. Lorrain & Co., appear to have been in considerable doubt how to act in consequence of their agent's conduct, and seem to have thought they might involve themselves in serious liability, if, having received the premium, they failed to insure the shipowners' interest in the freight. I think, therefore, that they intended to insure for the benefit of the shipowners and to cover the whole freight. But under the circumstances the efficiency of this insurance by them as agents on behalf of the shipowners would depend on ratification by the principals. But the ratification was not until after the loss had occurred and was known to the principals. The existing authorities certainly shew that when an insurance is effected without authority by one person on another's behalf, the principal may ratify the insurance even after the loss is known. Mr. Benjamin asked us, as a Court of Appeal, to review those authorities. His contention was that there could only be a ratification when the principal could himself make the same contract as that ratified. Admitting that for general purposes this rule may be good, the authorities which we are asked to overrule are much too strong and of too long standing to be got over. When a rule has been accepted as the law with regard to marine insurance for nearly a century, I do not think we ought to overrule it lightly, because insurances have probably been effected on the basis of the law that has so become settled, and mischief might arise from the disturbance of it. Moreover, I think that this is a legitimate exception from the general rule, because the case is not within the principle of that rule. Where an agent effects an insurance subject to ratification, the loss insured against is very likely to happen before ratification, and it must be taken that the insurance so effected involves that possibility as the basis

of the contract. It seems to me that, both according to authority and the principles of justice, a ratification may be made in such a case. That being so, the ratification does in fact take place, and the next question is, whether the plaintiffs can recover on this policy under the circumstances that have occurred. I quite agree that the policy being a valued policy the freight insured must be taken at the estimated value, and the policy cannot be opened nor the value of the thing insured disputed. But the Court is entitled to inquire of what elements the estimate of freight was made up, in other words, of what the freight so insured consisted, and to see whether the plaintiffs' claim with reference to such freight has been satisfied or not. We are of opinion that when the matter comes to be looked into it turns out that the plaintiffs have been paid more than the policy covers. This part of the case depends on the figures which I will not touch upon, because the Master of the Rolls has gone carefully into them and will deal with them. The remaining question is, as to the position of the underwriters for whom it is alleged that the plaintiffs are suing as trustees. Can they be in any better position than the plaintiffs themselves? We think not. They might be entitled to contribution, but instead of suing for contribution they prefer to take this so-called assignment of the policy from the plaintiffs, and to sue in their name for the entire amount of the policy. It seems to me that if they are defeated in consequence they are hoist by their own petard.

We are of opinion that the judgment should be for the defendants.

JESSEL, M.R. I am of the same opinion. The first question is one of evidence merely. Did Lorrain & Co. insure on behalf of the owners? Looking at all the facts I think they did. The next question is, What did they insure? We have been much pressed by the rule that in the case of a valued policy you cannot open the valuation. This only means, however, that you must take the value of the thing insured as proved; it does not settle the question what the thing insured is. The question here is, what was insured under the words "estimated freight." Was it meant that the total freight, including advances, should be insured, or only so much of the freight as remained unpaid, or due,

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or to become due to the shipowners? It is really a question of fact. The words of the policy may mean either. They may cover the portion of freight paid in advance or not. To ascertain whether they do we must look at the evidence. Now it is clear from the evidence that the total amount of freight, including advances, was intended to be insured. The amount of the valuation was 5941*l.* 1*s.* 2*d.*, and we have the elements of which it is composed. It is made up of the amount of the full freight, 5796*l.* 3*l.* 2*d.*, and of the amount of the address commission, 144*l.* 18*s.* The address commission appears to have been included under some misapprehension, because it was already included in gross freight. But the figures seem conclusive to shew that the entire freight was intended to be insured. The next question is, whether the policy is legally ratified. The decisions on this subject are too old, and have been too long recognised for us to interfere with them now. They are, in one sense, decisions of an inferior Court, but they were decisions of the highest Court at that time but the House of Lords, and have been accepted as law in every text-book written on the subject, and have doubtless been acted on by merchants. The decisions are, no doubt, somewhat difficult to reconcile with the general principle that one who ratifies a contract must have power to make such a contract himself at the time of ratification. But the exception to that rule having been long established, and being, in my opinion, justified by convenience, I see no reason for taking so violent a step as reversing that law now. Then, the plaintiffs having power to ratify, it is clear that they did ratify. But the question now arises whether the plaintiffs are entitled to recover anything on the policy. I will assume, for this purpose, that the plaintiffs have received 5500*l.* on the policies made in England, leaving 441*l.* 1*s.* 2*d.*, for which the plaintiffs had judgment below. The defendants now say that this amount of 441*l.* 1*s.* 2*d.* cannot be recovered under the policy now sued on, for this reason. They say that the plaintiffs insured the whole freight, and that a part of that freight was Lorrain & Co.'s advances, which were covered by the policy for 512*l.* 13*s.* 5*d.* effected by Lorrain & Co. to protect themselves, and the amount of which advances has been paid already upon that policy. To the extent of those advances they say that the

plaintiffs cannot recover, and that it is just as if the day after the insurance was effected the plaintiffs had assigned away that part of the freight. The question, therefore, arises what the advances consisted of. We have the elements of which the sum of 512*l.* 13*s.* 5*d.* was made up. They are, the actual advance, 165*l.* 11*s.* 4*d.*; 3 per cent. insurance on freight, 178*l.* 4*s.* 7*d.*, making 343*l.* 15*s.* 11*d.*; 2½ per cent. commission on that sum, 8*l.* 11*s.* 11*d.*; the address commission, 144*l.* 18*s.*, and 3 per cent. marine insurance on total advance, 15*l.* 7*s.* 7*d.* Now, as there was a ratification of the insurance, it follows that the captain had authority to request the plaintiffs' correspondents in Java to insure and to advance money for that purpose. And the terms of the charter provided that sufficient cash, not exceeding 600*l.*, was to be advanced against freight if required at ports of lading, subject to insurance and 2½ per cent. commission. It follows that the 178*l.* 4*s.* 7*d.* was within the clause an advance against freight, and that the charges of commission on insurance were also authorized. The only sum that remains is the address commission. That is also provided for by the charterparty, and the agent might have required that it should be paid in money, but the captain signed an account in which that commission is treated as an advance against freight to the captain's order. This makes it advance freight within the terms of the charter. But, apart from the agreement with the captain, the same result would have followed. The commission is due to the charterers, who will have to pay the freight. It is not a mere matter of set-off, but the charterers would have a right of retainer. If a person employed to sell anything earns his commission and receives the purchase-money, he is only bound to pay over the balance. So, quite independently of what the captain did, by the terms of the charter the commission is a deduction from freight. The shipowner could not recover it, because, by his direction, it was paid out of the freight to a person entitled to receive it. It consequently follows that more than the sum of 444*l.* 1*s.* 2*d.*, which was the balance remaining of the 5941*l.* 1*s.* 2*d.*, after payment of 5500*l.* under the other policies, constitutes advances, which were included under the policy for 512*l.* 13*s.* 5*d.*, effected by Lorrain & Co., and the amount of which has been paid under that policy. And, consequently,

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there can be nothing due to the plaintiffs upon the policy now sued upon, subject to the last point, which is this. When the existence of this policy was discovered, the English underwriters wished to obtain the right of suing the North China Insurance Company, and they attempted to put themselves in the position of purchasers of the policy from the plaintiffs to the extent of the amount to which each had underwritten. They then sue in the plaintiffs' name upon the policy. No question of contribution can be raised; they could have no right of contribution till they had paid the shipowners the amounts they had respectively insured. But the argument is that they have paid nothing. It is clear that this argument puts them in the position, not of underwriters entitled to contribution, but of mere purchasers of the policy who might have been outside strangers. But it is quite clear that that cannot be the real effect of the transaction. The payments made were not really purchase-money, but payment of the amounts insured by them, and they cannot sue, as they are really doing, to recover the amounts so paid from the defendants. In a proper form of action they could establish their right to contribution, but they cannot enforce it in this action.

MELLISH, L.J. I am of the same opinion. I agree with the judgment of the Common Pleas Division, so far as it deals with the matters that have been argued before us, and I shall only address my observations to the question on which we differ from their decision, and which does not appear to be noticed in the judgment of the Court below. The whole of the question seems to depend on this. What was it which was valued at 5941*l.* 1*s.* 2*d.* by the policy? Was it the whole of the freight, or the freight minus the advances? The insurance was no doubt made for the benefit of the shipowner, and what he was interested in was the freight minus the advances. The words "estimated amount of freight" will bear the meaning of freight minus the advances, for freight advanced is strictly speaking not freight at all. If the present case had stopped here, I should have thought the freight in which the shipowners was interested was what was estimated, but I am struck by the fact that the sum insured greatly exceeds not only the freight minus the advances, but the amount even of

the entire freight. The Court is entitled to inquire what was estimated in fact. Did Lorrain & Co. in fact estimate the amount of freight minus advances, or without deducting the advances? If they did the former, then as it is not alleged there was any fraud, the plaintiffs could recover the balance of the estimated amount over the 5500*l.* already received, but if in making this estimate the full freight was taken, then they cannot recover.

There is, in my opinion, evidence to shew that in making the estimate they commenced by taking the full amount of the freight, and then added the address commission to it. There is no rule which prevents our seeing the truth in this respect now and deciding accordingly. The result is, that the full amount of freight, not deducting the advances, must be taken at 5941*l.* 1*s.* 2*d.*, and the proper rule I should suppose to apply would be that whatever proportion the real amount of freight, deducting the advances, bore to the real amount of freight without such deduction, such proportion of the sum of 5941*l.* 1*s.* 2*d.* the plaintiffs would be entitled to recover. This, no doubt, makes it material to determine the amount of the advances. I agree that they include all the items contained in the sum of 512*l.*, including address commission. The only thing I doubt is, whether the whole of the item of 178*l.* 4*s.* 7*d.* can be treated as part of the advance. The captain no doubt settled that in his account as part of the amount he received in advance, but it was so treated on the assumption that he would have to pay 3 per cent., but it would appear only 1½ per cent. was actually paid. I think the charterers could only treat as an advance the sum they actually did advance. But even allowing for this, the advances appear to be such as to leave no balance above the sum of 5500*l.* recoverable under this policy.

POLLOCK, B. I am of the same opinion. It is unfortunate that the main point upon which we decide should not have become distinctly apparent in the Court below, so that it comes before us without having been completely sifted. It is clear, I think, that this insurance was effected for the benefit of the shipowners, and that the estimate was of the gross freight without deducting advances. The evidence seems conclusive on that point, because, on looking to figures, the amount of 5941*l.* 1*s.* 2*d.* is found to be

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the amount, not only of the gross freight, but of the gross freight plus the address commission.

I think we may look at all the circumstances to see what was the subject-matter of the insurance, and I think that they shew that such subject-matter was the full gross freight. Then I think, on considering the items making up the sum of 512*l.* 13*s.* 5*d.*, which Lorrain & Co. insured on their own account, that that amount consisted of advances under the charter, and to that extent the plaintiffs had no insurable interest, or it was as if they had assigned or parted with their interest to some one else, who had insured such interest in a separate and independent policy.

Whether it is to be treated as an insurance by persons who have no interest, or for an amount which has been paid under another policy, the result is the same, and the plaintiffs cannot recover. I wish to add a few words only with regard to the question of ratification. This question has long been settled by the Courts of law and mercantile usage. The case is an exception to the general rule founded upon principle. The analogy of the ratification of a sale of goods which had ceased to exist at the time of ratification, which was presented to us in the argument, is not really applicable. The insurance, by the very nature of the thing, was of goods lost or not lost. As a question of mercantile convenience, I think it very desirable that a ratification of an insurance under such circumstances should be permissible.

Judgment for the defendants.

Solicitors for plaintiffs: *Hollams, Son, & Coward.*
Solicitors for defendants: *Walton, Bubb, & Walton.*

THE GENERAL SHARE TRUST COMPANY *v.* CHAPMAN. 1876 *June* 27.

Solicitor's Lien for Costs.

The defendant, a solicitor, was employed by one H. (who was a director and promoter of a limited company then in liquidation), with the privity of three other persons, the holders as nominees of H. of certain shares in the company, to take proceedings in connection with the winding-up of the company. H. deposited with the defendant the certificates of the shares for the purpose of enabling him to carry out his instructions, and the defendant received from the liquidator of the company certain cheques in respect of the shares standing in the names of those persons. In the meantime H. transferred to the plaintiffs his interest in the shares, with notice of the lien and charge of the defendant thereon for his costs, and the defendant, acting upon the retainer of the plaintiffs, continued the proceedings, and ultimately received from the liquidator four several cheques payable to H. and the other three persons respectively. In an action to recover these cheques:—

Held, that the defendant was entitled, as against the plaintiffs, to a lien upon them for his costs of all the proceedings against the company in respect of the shares.

STATEMENT of claim. 1. The defendant is a solicitor carrying on business in London.

2. The plaintiffs, in November, 1875, employed the defendant to obtain payment from the liquidator of the West Cumberland Union Colliery Co., Limited, of four sums of money which the plaintiffs had purchased of Mrs. A. B. Charles, Miss P. M'Nicoll, Miss L. M'Nicoll, and Mr. T. O'Hagan.

3. The defendant applied to the liquidator for payment of the said moneys, and, after some correspondence, the liquidator handed to the defendant in payment of the said moneys four cheques, one for 153*l.* 3*s.*, payable to the order of Mrs. A. B. Charles, one payable to the order of P. M'Nicoll for 51*l.* 1*s.* 6*d.*, one payable to the order of L. M'Nicoll for 51*l.* 1*s.* 6*d.*, and one payable to the order of T. O'Hagan for 51*l.* 1*s.* 6*d.*, being the several amounts which the plaintiffs had purchased from the said parties, and of which the plaintiffs had employed the defendant to obtain payment as in the second paragraph mentioned.

4. The plaintiffs have applied to the defendant for the said cheques, but the defendant refuses to deliver them up to the plaintiffs unless the plaintiffs pay to the defendant a sum of money claimed to be due to the defendant from the said A. B.

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Charles, P. M'Nicoll, L. M'Nicoll, T. O'Hagan, and other persons. The plaintiffs are willing and have offered to pay to the defendant his costs of applying for and obtaining the said cheques.

5. The said A. B. Charles, P. M'Nicoll, L. M'Nicoll, and T. O'Hagan are willing and desirous that the said cheques should be delivered to the plaintiffs.

The plaintiffs claim possession of the cheques, damages for their detention, and such further and other relief as the nature of the case may require.

Statement of defence. The defendant, in or about the month of July, 1874, was instructed through one Henry Osborne O'Hagan (who was duly authorized in that behalf) to appear and act as solicitor for A. B. Charles, P. M'Nicoll, L. M'Nicoll, and T. O'Hagan (in the plaintiffs' statement of claim respectively mentioned), as well as for other persons in whose names certain shares in the West Cumberland Union Colliery Co. stood, in certain proceedings which were being taken in the High Court of Chancery in connection with the winding-up of the said company.

2. In pursuance of the said instructions, the defendant appeared in the course of the proceedings on behalf of the said A. B. Charles, P. M'Nicoll, L. M'Nicoll, and T. O'Hagan, and the said other persons. The moneys and cheques referred to in the plaintiffs' statement of claim in this action became payable to the said A. B. Charles, P. M'Nicoll, and L. M'Nicoll, and T. O'Hagan by the liquidator of the said company in respect of the shares standing in their names, in consequence of the steps taken by the defendant as their solicitor to protect their interests in the said winding-up proceedings. The costs of the defendant for the professional services rendered by him as aforesaid have never been paid, and the defendant was, at and before the date of the commencement of this action, and still is, entitled to a lien on the said moneys and cheques for the amount of the said costs.

3. The said H. O. O'Hagan had been a promoter and was one of the directors of the said company, and the said A. B. Charles, P. M'Nicoll, L. M'Nicoll, and T. O'Hagan, or some of them, were holders of the said shares which were standing in their names as aforesaid as nominees of the said H. O. O'Hagan. The said H. O.

O'Hagan was in fact beneficially entitled to the said shares, and had the custody of the certificates relating thereto as the beneficial owner thereof.

4. The said H. O. O'Hagan in or shortly after the month of July, 1874, with the privity of the said shareholders, gave instructions to the defendant to transact and the defendant transacted other legal business connected with the affairs of the said company. The defendant consequently became entitled and is still entitled to considerable sums of money for costs in respect of professional services rendered and payments made by him in pursuance of the said instructions.

5. In the course of the employment of the defendant in his professional capacity as above mentioned, the said H. O. O'Hagan deposited with the defendant the certificates of the shares standing in the names of the said A. B. Charles, P. M'Nicoll, L. M'Nicoll, and T. O'Hagan, for the purpose of enabling the defendant to carry out his instructions with reference thereto, and also as a security for the costs due and to become due to the defendant in connection with the matters above alluded to. The whole of the said costs are still due and unpaid. The said certificates were afterwards given up by the defendant to the liquidator of the company in exchange for the cheques in the plaintiffs' statement referred to. Under the circumstances above stated, the defendant claims to be entitled to a lien or charge on the said cheques and the moneys represented thereby for the amount of the said costs.

6. The said cheques had not at the commencement of this action and never have been indorsed by the persons to whose order they are made payable respectively.

7. The defendant submits that the said H. O. O'Hagan, A. B. Charles, P. M'Nicoll, L. M'Nicoll, and T. O'Hagan are respectively necessary parties to this action.

8. The claim of the plaintiffs to the said cheques and to the moneys represented thereby, so far as they have any claim thereon, has arisen by means of a transfer or pretended transfer to them by the said H. O. O'Hagan of his interest therein. The plaintiffs had notice of the lien and charge of the defendant at the time

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such transfer was made. The said transfer or pretended transfer was in fact a device of the said H. O. O'Hagan to evade payment of the costs due to the defendant.

9. The defendant denies that the plaintiffs had offered before the commencement of this action to pay to the defendant his costs of applying for and obtaining the said cheques, as alleged by the plaintiffs in the fourth paragraph of their statement of claim. The defendant also denies that the said P. M'Nicoll and L. M'Nicoll are willing aud desirous that the said cheques should be delivered to the plaintiffs.

Demurrer to the defendant's statement of defence, with the exception of the ninth paragraph thereof, on the ground that, as it is admitted on such pleadings that the defendant obtained the cheques in the statement mentioned as solicitor and agent for the plaintiffs, he had no lien upon the same for charges other than those payable to him by the plaintiffs.

June 1. *Petheram*, in support of the demurrer. Having admitted his retainer by the plaintiffs, and having obtained the cheques by virtue of that retainer, the defendant is estopped from setting up a right to retain them as a security for charges due to him from a third person. He has, no doubt, a lien on them for his costs incurred in recovering them, but not for the costs due to him from his former clients. Before anything became payable in respect of them, the holders of the shares had parted with their interest therein to the plaintiffs. The defendant now seeks to charge the plaintiffs with the costs incurred in the proceedings taken by those persons. Having accepted the plaintiffs' retainer to obtain payment for them from the liquidator, the defendant is clearly estopped from setting up any lien upon the cheques which he has obtained except in respect of costs incurred by them: *Hicks* v. *Keate*. (1)

Bradford, contrà. The whole statement of defence taken together amounts only to an admission of a retainer under the circumstances therein specially set forth. The retainer by the plaintiffs was but a continuation of the defendant's original em-

(1) 3 Jur. 1024.

ployment by H. O. O'Hagan and the three other persons mentioned.

[BRETT, J. If the defendant had not accepted an employment under the plaintiffs, he clearly would have been entitled to set up this lien. But, is he not estopped by his acceptance of the plaintiffs' retainer?]

The plaintiffs took the shares with full knowledge of the defendant's claim; they therefore took them subject to all the burthens to which they were incident.

Petheram, in reply. It must be assumed upon this demurrer that the defendant accepted the retainer without making any condition.

Cur. adv. vult.

June 27. The judgment of the Court (Brett, Denman, and Archibald, JJ.,) was delivered by

ARCHIBALD, J. The question which arises upon this demurrer is whether or not the defendant has a lien for his costs upon certain cheques which in his capacity of solicitor he has obtained for the plaintiffs upon the liquidation of the West Cumberland Union Colliery Company, Limited.

The defendant had been originally employed by one Henry Osborne O'Hagan (who was a director and promoter of the West Cumberland Union Colliery Company) with the privity of three other persons, the holders as nominees of O'Hagan of certain shares in the company, to take proceedings on their behalf in respect of the shares; and in consequence of the steps so taken the cheques claimed by the plaintiffs were obtained by him from the liquidator. He had also done other work for O'Hagan in connection with the affairs of the company.

O'Hagan, who was the person beneficially entitled to the shares, and who had the custody of the certificates relating to them, had deposited the certificates with the defendant for the purpose of enabling him to carry out his instructions and as a security for the costs due and to become due in connection with the matters above alluded to, none of which however have been paid.

O'Hagan afterwards transferred to the plaintiffs his interest in

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the shares, with notice of the lien and charge of the defendant; and the defendant under these circumstances accepted the retainer of the plaintiffs.

The shares deposited with him were given up to the liquidator of the company in exchange for the cheques mentioned in the statement of claim, which the plaintiffs are seeking to have delivered to them discharged of any lien in respect of charges due from O'Hagan.

We are, however, of opinion that, under the circumstances mentioned, the only interest transferred to the plaintiffs was an interest subject to the lien already created upon the shares, of which it is admitted the plaintiffs had notice; and the fact that the defendant accepted from the plaintiffs a retainer as an attorney to recover the amount for them, does not necessarily amount to an abandonment of his claim, or entitle the plaintiffs to have the amount recovered without first satisfying the defendant's claim.

Another point was made which we disposed of in the course of the argument, viz. that, as there was an admission of the retainer, the statement of defence was invalid; but it is obvious that the whole defence must be read together as an admission of a retainer under the circumstances specially set forth; and so read it amounts to what we have stated, and constitutes a sufficient defence.

Judgment must, therefore, be given for the defendant, with costs.

Judgment for the defendant.

Solicitors for plaintiffs: *Warry, Robins, & Burges.*

Solicitor for defendant: *Sidney Chapman.*

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June 28.

Contract of Sale—Statute of Frauds, 29 *Car.* 2, *c.* 3, *s.* 17—*Signature to Contract in Broker's Book.*

A broker acting for the plaintiff made a contract for the sale of goods to the defendant, sending a note to each party, but signing only that which was sent to the seller; he, however, entered the contract in his book in which he signed both the bought and the sold-note. The defendant kept the note which was sent to him without objection until called upon to accept the goods, when he repudiated the contract, assigning for reason that the note sent to him was not signed:—

Held, that the conduct of the defendant amounted to an admission that the broker had authority to make the contract for him, and consequently that his signature to the sold-note bound the defendant.

Held, also, that the signed entry in the broker's book was a sufficient memorandum of the bargain to satisfy the Statute of Frauds.

ACTION for not accepting butter pursuant to contract.

The cause was tried before Brett, J., at the last spring assize at Liverpool. The contract was made by one Price acting as broker for the seller, and he delivered notes to both buyer and seller, signing the note which he sent to the seller, but not that which he sent to the buyer. He, however, entered the contract in his book, in which he signed both the bought and the sold-note. The defendant kept the bought-note without complaint or remonstrance for two or three weeks; and, when called upon to accept the butter, he repudiated the contract, not on the ground that he had not entered into it, but on the ground that it was unsigned, writing to the broker "You did not sign it."

It was objected, on the part of the defendant, that there was no sufficient memorandum of the contract within the Statute of Frauds.

The learned judge ruled otherwise, observing that, after receiving and keeping the bought-note, the defendant could not allege that Price was not an agent to make a memorandum; and he directed judgment to be entered for the plaintiff, but gave the defendant leave to move to enter judgment for him, if the Court should be of opinion that there was no sufficient memorandum within the statute.

May 24. *Gully* moved for judgment accordingly. There was

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no sufficient memorandum within the Statute of Frauds. The plaintiff employed the broker to sell for him. The broker made out bought and sold-notes; and sent one to the plaintiff, his principal, and the other to the defendant, the buyer. The bought-note sent to the defendant was not signed so as to constitute a memorandum of the contract; but the broker made an entry of the contract in his book, and signed it. The agent of one party, however, cannot by making an entry in his book behind the back of the other party bind him. All the cases in which the entry in the broker's book has been treated as a sufficient memorandum within the statute have been cases in which the broker was assumed to be agent for both parties. There was no evidence here that the broker was agent for the defendant either to make the contract or to sign the book. The defendant, it is true, retained the note for some time. That, however, is no admission that the contract had been made or signed on his behalf.

[GROVE, J. Can the mere act of the broker of the one party throw upon the other the onus of repudiating the broker's agency?]

There was no evidence to shew that it was the practice of Liverpool brokers to keep books in which contracts are entered, so as to affect the defendant with knowledge of the existence of such book. [The following cases were referred to: *Graham* v. *Masson* (1); *Thornton* v. *Charles* (2); *Thornton* v. *Meux* (3); *Sievewright* v. *Archibald* (4); *Rucker* v. *Cammeyer.* (5)]

T. H. James shewed cause. There was abundant evidence that the broker was agent for both parties to sign the book; and, if so, there was a sufficient memorandum within the statute. [He cited Blackburn on Sale, 2nd ed. 203, 256, and *Chapman* v. *Partridge.* (6)]

Gully was heard in reply.

Cur. adv. vult.

June 28. The judgment of the Court (Brett, Grove, and Archibald, JJ.,) was delivered by

BRETT, J. This was an action for not accepting butter pursuant to contract. It was tried before me, and I directed judgment to

(1) 5 Bing. N. C. 603.
(2) 9 M. & W. 807.
(3) M. & M. 43.
(4) 17 Q. B. 103; 20 L. J. (Q.B.) 529.
(5) 1 Esp. 105.
(6) 5 Esp. 256.

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be entered for the plaintiff. A motion has been made to enter judgment for the defendant in pursuance of leave reserved by me for that purpose, on the ground that there was no evidence of any memorandum of the contract within the Statute of Frauds. The facts were these:—The contract was made with a person who must be taken to be a broker, and who was acting for the seller only, and not for the buyer. The defendant agreed upon the terms of sale with the broker. These terms were not disputed. If there was a sufficient memorandum in writing signed by or on behalf of the party to be charged, the defendant had unjustifiably refused to accept the butter. The broker sent a note of the contract to the buyer and also to the seller. He signed the note which was sent to the seller, but he did not sign that which he sent to the buyer. He, however, entered in his broker's book both the bought and the sold-note, and signed them both. The butter was tendered to the defendant some time after the note was sent to him, he having kept the latter until then without complaint or remonstrance. The reason he assigned for his refusal was, not that he had not entered into the contract, but that the note sent to him was not signed. I decline to enter into the terms of the two notes, as to which was the bought and which was the sold-note. The real question upon the notes on this point always turns on the person to whom the note is sent. If the broker is authorized by the buyer to make a contract, the note sent by him to the seller is the note which is intended to be the bargain, and vice versâ. The note which was to bind the defendant here, was the sold-note. We are not driven to rely on the notes in the broker's book, because the note delivered to the plaintiff (if the broker had authority to sign the memorandum) binds him. The authorities are conclusive to shew that the broker acting for one of the contracting parties, making a contract for the other, is not authorized by both to bind both. But the broker who makes a contract for one may be authorized by that person to make and sign a memorandum of the contract. That has frequently been held. The question here is whether there was any evidence that the broker was so authorized. The evidence was, that a note of the bargain was sent to the buyer; and that his only objection was, not that the broker who sent it had no authority to send it, or that no such contract was

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made, but that the memorandum sent to him was not signed. That was ample evidence for the jury that the defendant recognized the authority of the broker to sign for him. Luckily, however, the broker did sign the note which was to bind the defendant, that is, the sold-note. Then, this further fact remains, that the broker kept a book in which both bought and sold-note were entered and signed by him. I therefore think that, even if the signature to the note sent to the seller was not sufficient to bind the buyer, the signature in the broker's book was enough to satisfy the statute. The broker being a broker authorized to make a memorandum of the contract on the defendant's behalf, the entry in his book was sufficient evidence of a memorandum of the bargain signed by a duly authorized agent within the meaning of the Statute of Frauds to bind the defendant.

My Brother Grove has doubts, and wishes me to say that, in his judgment, the fact of the defendant keeping the note sent to him without objection was not sufficient to shew an authority in the broker to bind him. But he thinks that, inasmuch as when the defendant made the objection he confined it to saying "You did not sign it," he thereby admitted the agency of the broker to make the contract on his behalf. He therefore agrees with me that judgment was rightly entered for the plaintiff.

My Brother Archibald authorizes me to say that he concurs in the above judgment, and in the reasons I have given.

Judgment for the plaintiff.

Solicitor for plaintiff: *S. C. H. Sadler, for T. Bellringer, Liverpool.*

Solicitors for defendant: *Whitley & Maddock, Liverpool.*

PURCELL *v.* SOWLER AND OTHERS. 1876 *June* 18.

Libel—Privilege by Reason of the Occasion—Comments on Matters of Public Interest.

To justify the publication in a newspaper of defamatory comments,—apart from reports of what passes in Courts of Justice,—it must be shewn either that the person of whom the defamatory matter is written was a person whose position and character are of general interest to the whole country, or that the subject-matter dealt with is one of general interest to the whole community. It is not enough to shew that the individual fills a public character of a limited kind and in a limited district, or that the subject-matter dealt with is of interest only to a small portion of the public, or to the public in a limited district.

The defendants, the proprietors of a newspaper, published a report of the proceedings at a meeting of the board of guardians of a provincial union, containing false and defamatory matter reflecting upon the medical officer of the union workhouse:—

Held, not privileged by the occasion, though the report was admitted to be bonâ fide and a correct account of what passed at the meeting.

Affirmed on appl. 2 C.P.D. 215

ACTION for a libel. The statement of claim was as follows:—

1. The plaintiff was at the time of the committing of the grievance hereinafter mentioned, and still is, a physician and surgeon practising at Knutsford, in the county of Chester, and was and is also the duly-appointed medical officer of the Knutsford workhouse at Knutsford, which said workhouse is within the Altrincham Union for the administration of the laws for the relief of the poor.

2. The defendants were at the time of the committing of the grievance hereinafter mentioned, and still are, the printers and publishers of a daily newspaper called *The Manchester Courier and Lancashire General Advertizer*, printed and published at Manchester, and having a wide circulation, in particular in Lancashire and Cheshire.

3. The Defendants, being such printers and publishers as aforesaid, on the 30th of December, 1875, falsely and maliciously printed and published of and concerning the plaintiff, and of and concerning him in his said profession of physician and surgeon, and of and concerning him in his said office of medical officer as aforesaid, in the said newspaper called, &c., the words following, that is to say,—"More alleged neglect at Knutsford workhouse.

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At the fortnightly meeting of the Altrincham board of guardians yesterday, Mr. Fullalove the chairman of the house committee, reported that a few days ago an inmate of the house, John Oldham, of Bollington, was taken seriously ill, and the master sent a messenger for the doctor (meaning thereby the plaintiff) at about 7 o'clock in the morning. He (meaning thereby the plaintiff) did not arrive in forty minutes: the porter went to his (meaning thereby the plaintiff's) house, and told him (meaning thereby the plaintiff) that the man was dying, and that he should walk about the front of his (meaning thereby the plaintiff's) house until he (meaning thereby the plaintiff) came. On the visit of the porter, the doctor (meaning thereby the plaintiff) went to the bed-room window. When the doctor (meaning thereby the plaintiff) did arrive, the man was dead. The chairman (Mr. J. Ambler) observed that, if the doctor (meaning thereby the plaintiff) had come when first desired, he would probably have seen the man alive. Mr. Fullalove said that, when the porter went to fetch him (meaning thereby the plaintiff), he was in bed. Mr. Taberer, the master of the house, said that that was the third time the doctor (meaning thereby the plaintiff) had served him like that. On a recent occasion, a man was brought in a cab from Wilmslow at 12 o'clock at night. The doctor (meaning thereby the plaintiff) was sent for, but he (meaning thereby the plaintiff) did not come until a quarter past 2: he (meaning thereby the plaintiff) kept five of them waiting up two hours for him. Mr. Green, Wilmslow, said that that was perhaps the most serious charge which had been brought against the doctor (meaning thereby the plaintiff). A man was found to be dying, whereupon a boy was dispatched for the doctor (meaning thereby the plaintiff), and told him (meaning thereby the plaintiff) that a man was very poorly. Subsequently the porter went; and the doctor (meaning thereby the plaintiff) paid little attention to him, although he stated that the man was dying. The fullest inquiry should be made. The case assumed a very serious aspect; and, if the case were good, the doctor (meaning thereby the plaintiff) ought to be called upon to resign. The board decided to hold an inquiry into the charges preferred against the doctor; meaning thereby and imputing to the plaintiff thereby that the plaintiff had been and was guilty of gross mis-

conduct in his profession of physician and surgeon as aforesaid, and in his office of medical officer as aforesaid, and had acted in his said profession and in his said office negligently, improperly, and with great cruelty; whereby the plaintiff had been and was greatly prejudiced and injured in his credit and reputation, and in his profession of physician and surgeon as aforesaid, and in his office of medical officer as aforesaid, &c.

Statement of defence,—

1. The defendants admit the allegations contained in paragraphs 1 and 2 of the plaintiff's statement.

2. The defendants admit that the words set forth in paragraph 3 of the plaintiff's statement were printed and published by them, but they deny the other allegations in that paragraph contained. The defendants are public journalists, and the said words were printed and published by them as such public journalists, in a public journal, bonâ fide, without malice, and for the public benefit, and not otherwise, and were and are a correct, fair, impartial, and honest report and account of proceedings of public interest and concern. Issue thereon.

At the trial before Brett, J., at the last spring assizes at Manchester, a verdict was by consent entered for the plaintiff, damages 40*s.* (with certificate), leave being reserved to move to enter a verdict for the defendants if the Court should be of opinion that the publication was privileged, it being admitted to be bonâ fide and a correct account of what passed at the meeting described.

May 16. *Edwards, Q.C.*, moved to enter judgment for the defendants. The publication complained of, being admitted to be a correct account of what took place at the meeting, and to have been published bonâ fide and without malice, falls within the range of what the law holds to be privileged, being a matter of public interest, and the meeting being a public meeting authorized by Act of Parliament to be held by the guardians. The rule as to privileged publication is well laid down by Cockburn, C.J., in *Wason* v. *Walter*. (1) "The true criterion," he says, "of the privilege is, not whether the report was or was not ex parte, but whether it was a fair and honest report of what had taken place, published

(1) Law Rep. 4 Q. B. 73, 94.

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simply with a view to the information of the public, and innocent of all intention to do injury to the reputation of the party affected." That applies with equal force to a report of the proceedings of a meeting like that in question as to proceedings in a Court of justice. In *Campbell* v. *Spottiswoode* (1), the same learned judge assents to the proposition that fair comments upon a matter of public interest are privileged. In *Kelly* v. *Tinling* (2), a churchwarden having written to the plaintiff, the incumbent, accusing him of having desecrated the church by allowing books to be sold in it during service, the correspondence was published by the defendant in a newspaper, with comments on the plaintiff's conduct: and it was held that this was a matter of public interest, which might be made the subject of public discussion; and that the publication was therefore not libellous, unless the language used was stronger than in the opinion of the jury the occasion justified. Cockburn, C.J., says (3): "I cannot think that a dispute between a clergyman and his churchwardens as to what he allows to be done in his church during divine service, and the uses to which he puts part of it, viz. the vestry-room, which were the matters involved in the correspondence between them, is not a subject of public interest. The maintenance of decency and propriety in conducting public worship, and of the sanctity of the sacred edifice and all connected with it, is surely a matter of the greatest public concern."

[BRETT, J. The conduct of a clergyman in reference to the management of his church is matter of general public interest: but probably it would be otherwise with reference to the management of a charity.]

In *Henwood* v. *Harrison* (4), Willes, J., delivering the judgment of the Court, says: "The principle upon which these cases are founded is a universal one, that the public convenience is to be preferred to private interests, and that communications which the interests of society require to be unfettered may freely be made by persons acting honestly without actual malice, notwithstanding that they involve relevant comments condemnatory of individuals."

(1) 3 B. & S. 769, 776; 32 L. J. (Q.B.) 185.
(2) Law Rep. 1 Q. B. 699.
(3) Law Rep. 1 Q. B. at p. 701.
(4) Law Rep. 7 C. P. 606, 622.

In *Davis* v. *Duncan* (1), it was held that the conduct of persons at a public meeting held for the purpose of promoting the election of a candidate for a seat in parliament, may be made the subject of fair and bonâ fide discussion by a writer in a public newspaper, and unfavourable comments made upon such conduct in the course of such discussion are privileged. The case which presses the most strongly against this argument is *Davison* v. *Duncan* (2), where it is held that the publication of matter defamatory of an individual is not privileged because the libel is contained in a fair report in a newspaper of what passed at a public meeting. The alleged libel consisted of remarks made at the meeting, in which it was suggested that the plaintiff, who had been secretary to a former Bishop of Durham, had obtained a licence as chaplain to a cemetery by misrepresentations to the present bishop. Lord Campbell said (3): "It is of great consequence that the public should know what takes place in Court; and the proceedings are under the control of the judges. The inconvenience, therefore, arising from the chance of injury to private character is infinitesimally small as compared to the convenience of publicity. But it has never yet been contended that such a privilege extends to a report of what takes place at all public meetings. Even if confined to a report of what was relevant to the object of the meeting, it would extend the privilege to an alarming extent. If this plea is good, a fair account of what takes place may be published, whatever harm the publication may do to private character, provided it take place at a meeting of a public nature,—a wide description, embracing all kinds of meetings, from a county meeting to a parish meeting." The commissioners in that case had no power to inquire into the conduct of the clergyman, nor was the matter one of public interest: but here it was the duty of the guardians to inquire into the conduct of the medical officer of the union with regard to the poor under his charge, and the matter clearly was of public interest. If a comment on such a matter is privileged, how much more so must be a fair and impartial report.

C. Russell, Q.C., and *Bigham*, shewed cause. There is no privilege in this case. The meeting the proceedings of which the

(1) Law Rep. 9 C. P. 396. (2) 7 E. & B. 229; 26 L. J. (Q.B.) 104.
(3) 7 E. & B. at p. 231.

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defendants professed to publish was not a statutory meeting, but a meeting which the guardians are impowered to hold under the regulations of the Poor Law Board. It is not unimportant to observe the heading of the libellous article,—"More alleged neglect at Knutsford workhouse." The imputation on the plaintiff was grave, charging him with breach of duty as medical officer, and with want of humanity. It cannot be said that the inquiry was in any sense a matter of public interest: it was a mere matter of internal arrangement by the guardians. *Popham* v. *Pickborn* (1) is directly in point. It was there held that, if a report made by a medical officer of health to a vestry board in pursuance of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, contains libellous matter, a newspaper proprietor is not privileged in publishing it, though without any comment. "Undoubtedly," says Wilde, B., in delivering the judgment of the Court, "the report of a trial in a Court of justice in which this document had been read would not make the publisher thereof liable to an action for libel, and reasonably, for such reports only extend that publicity which is so important a feature of the administration of the law in England, and they enable to be witnesses of it, not merely the few whom the Court can hold, but the thousands who can read the reports. But no case has decided that the reports of what takes place at the meeting of such a body as this vestry are so privileged: indeed, the case cited in the argument is an authority that they are not." The case referred to was *Davison* v. *Duncan*. (2) To be privileged, the report or the comment must be based upon truth. A public journalist has no privilege in publishing libellous matter, merely because it has been uttered at a public meeting. Then, was this a matter of such public interest as to justify the defendants in reporting it? The matter reported on was a charge of private misconduct on the part of an individual in which the general public could have no concern. The case of *Henwood* v. *Harrison* (3) carried the privilege as far as it reasonably can be carried: but the decision there turned upon the ground that the subject-matter of the publication was of such great national importance that a fair and

(1) 7 H. & N. 891; 31 L. J. (Ex.) 133. 8 Jur. N. S. 179.
(2) 7 E. & B. 229; 26 L. J. (Q.B.) 104. 3 Jur. N. S. 613.
(3) Law Rep. 7 C. P. 606.

bonâ fide discussion of it was of interest to all the world. But it is difficult to say that it can interest the whole world to know what has been done by an obscure medical man in a remote district of the kingdom.

Edwards, Q.C., in reply. To justify a comment on a public matter, it is not necessary that all the facts should be strictly true.

Cur. adv. vult.

June 28. The judgment of the Court (Brett, Archibald, and Lindley, JJ.), was delivered by

BRETT, J. In this case, which was an action by the plaintiff against the defendants, who are the printers and publishers of a newspaper called *The Manchester Courier and Lancashire General Advertizer*, for a libel, the libel consisted of a report and a comment upon matters which happened at a meeting of the board of guardians of the Altrincham Union, with reference to the conduct of the medical officer of the Knutsford workhouse, and his treatment of the poor under his charge. There is no doubt that the report and the comments were disparaging to the plaintiff; but it is to be taken that the report is a true and correct statement of what actually passed at the meeting, and that the comment was a fair comment, and that the defendants were not actuated by any malicious motives whatever. The only question is whether, the defendants having published this defamatory matter, it can be said that it was published on a privileged occasion, by reason of its being a fair comment on a matter of general public interest.

Upon the argument it was suggested that this was a matter of public interest, upon the ground that the treatment by a public medical officer of the poor under his charge is a matter of interest to everybody in the kingdom, that the poor are under the protection of the public, and therefore that the conduct of every medical officer with regard to any of the poor is a matter of public and general interest. On the other hand, it was urged that the conduct of a medical officer in a remote district, and his treatment of the poor,—not of all the poor, but of a certain portion of the poor, viz. those of a particular district or union,—though in one sense

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a matter of interest to all humane persons, is not a matter of such general interest to the public, that is, to all the public, as to make the publication of a report of what passes on the subject at a meeting of a local board of guardians privileged by the occasion. It was upon some doubt as to which of these arguments ought to prevail that we took time to consider. After consideration, we have come to the conclusion that, where this kind of privilege is invoked, it must be shewn either that the person of whom the defamatory matter is written was a person whose position and character are of general interest to the whole country, or that the subject-matter dealt with is one of general interest to the whole country; and that it is not enough to shew that he fills a public character of a limited kind and in a limited district, or that the subject-matter dealt with is a matter of interest only to a small portion of the public, or to the public in a limited district, and not a matter of general public interest.

Now, as regards this plaintiff, he was shewn to be a most respectable person, and, when the matter came to be investigated, it turned out that there was no real imputation upon his character or conduct. But the character of such a person can hardly be said to be a matter of public interest to the whole country. It is, no doubt, of interest to the people of the district the poor of which are committed to his professional care, but nothing more. Such a question of character, interesting to the whole country, might arise with regard to a Secretary of State or a public board having to deal generally with the whole of the poor of the kingdom. But this gentleman's duties were strictly confined to a limited district, and therefore neither as to his person nor as to the subject-matter with which he had to deal can it be said that the general public could have any interest in it. It is impossible, therefore, to bring this case within the rule acted upon in this Court in the case of *Davis* v. *Duncan*. (1) There, the libel complained of was a report of what passed at a public meeting for the election of a member of Parliament in reference to the conduct of certain persons, with comments thereon: and it was held that the character of a member of Parliament, who has to represent

(1) Law Rep. 9 C. P. 396.

not only his own particular constituency but the whole country when elected, is of such public interest to the whole country as to warrant fair comment and criticism upon his character and conduct.

Kelly v. *Tinling* (1) has perhaps gone further than any other case upon the subject. The defendant had commented in a newspaper upon the conduct of the plaintiff, a clergyman, with reference to matters occurring in the church and in the vestry-room: and the Court of Queen's Bench held that the conduct of a clergyman of the Church of England in the recognized public worship of the kingdom was a matter of public interest which might be made the subject of public discussion, inasmuch as "the maintenance of decency and propriety in conducting public worship, and of the sanctity of the sacred edifice, and all connected with it, is a matter of the greatest public concern." In *Henwood* v. *Harrison* (2) the comments were upon the character of a person whose character individually was of no public interest, but they were made in reference to his capacity to deal with a plan for the re-construction of the navy of England; and it was held that therefore the comments were justifiable, being made with reference to a matter of great public interest to the whole kingdom. And in *Wason* v. *Walter* (3) comments on charges made by a member of Parliament in a speech in the House of Commons impugning the character and conduct of a learned judge, were held to be privileged, on the ground that the character and conduct of a judge, who is charged to administer justice to all the subjects of the Queen, are of the highest possible public interest and concern.

In all these instances the privilege has been confined to the publication of reports or comments upon persons whose position was of public interest to the whole community, or with reference to matters of public interest to the whole community. Here, however, neither the position of the person whose conduct is commented upon nor the subject-matter with which the libel deals is of such general and public interest and importance as to bring the defendants within the protection of privilege.

(1) Law Rep. 1 Q. B. 699. (2) Law Rep. 7 C. P. 606.
(3) Law Rep. 4 Q. B. 73.

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The motion to enter judgment for the defendants therefore fails, and the judgment entered for the plaintiff at the trial will stand.

Judgment for the plaintiff.

Solicitor for plaintiff: *C. W. Dommett, for John Robinson Barling, Manchester.*

Solicitors for defendants: *Johnson & Weatheralls, for Stevenson, Lycett, & Co., Manchester.*

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1876, will be as follows:—

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1 C. P. D. — 1 P. D.

In the Third Series,
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2. —— *Bills of Sale Act*, 17 & 18 *Vict.* c. 36, s. 1—*Proof of due filing of the Bill of Sale and Affidavit.*] Upon the trial of an interpleader issue, the plaintiff, in order to prove the due filing of a bill of sale in compliance with 17 & 18 Vict. c. 36, s. 1, produced the bill of sale itself and the following certificate stamped with the seal of the Court of Queen's Bench,—"*Johnson* and *Mason*,

AFFIDAVIT WITH BILL OF SALE—*continued.*
A document purporting to be a copy bill of sale, and dated the 8th day of April, 1875, indorsed with the above names, was registered at the judgment office of the Court of Queen's Bench on the 15th day of April, 1875:"—*Held*, no evidence that an affidavit satisfying all the requirements of the statute had been filed with the bill of sale. MASON *v.* WOOD - - - - 63

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ARREST OF DEBTOR—*continued.*
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2. —— *Debtors Act*, 1869 (32 *&* 33 *Vict. c.* 62), *s.* 5—*Jurisdiction of the Mayor's Court under.*] The 5th section of the Debtors Act, 1869, gives power to all Courts, including inferior courts, to make orders and to commit to prison, not only in respect of orders or judgments of inferior courts, but also in respect of those of the superior Courts, to the extent of 50*l.*—*Held*, that the jurisdiction of the Mayor's Court, London, under the Act, is confined to cases in which the debtor is at the time of the issuing of the summons resident or carrying on business within its limits.—*Quære*, whether it is not also limited to cases in which that court would have had jurisdiction over the original cause of action.—The power given to inferior courts by the Act to rescind or vary orders, does not enable an inferior court to rescind or vary an order of a superior Court on a judgment of the latter. Washer *v.* Elliott - - - - - 169

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ASSESSMENT TO POOR-RATE — *Poor-rate—Rateability of Moorings in the River Thames—Thames Conservancy Act*, 1857, 20 *&* 21 *Vict. c. cxlvii. s.* 91.] The conservators of the river Thames, who are by statute owners of the river bed, gave permission, by resolution, to the plaintiffs to lay down certain moorings in the river bed, and place a derrick hulk at them, the work to be done to the satisfaction of the conservators and under the inspection of the harbour master, and to remain on certain conditions being agreed to and observed by the plaintiffs. These conditions provided that a certain rent should be paid for the moorings, and specified the purposes for, and the manner in which, the hulk was to be used, and that in all other respects it was to be worked to the satisfaction of the conservators, under the inspection of the harbour master; and the permission was expressed to be granted on the full understanding, on the part of the plaintiffs, that if at any time thereafter it should be found inexpedient to permit the moorings for the derrick hulk to remain in that or any other part of the river, the conservators would, under the powers vested in them by the 91st section of the Thames Conservancy Act, cause the same to be removed. That section provides that no mooring chains shall be put down in the river without the permission of the conservators, and that the conservators may at any time, by giving a week's notice in writing, require such mooring chains to be removed; and if not removed accordingly, may themselves remove them.—In pursuance of the permission so given, the plaintiffs procured moorings to be laid down, paying for the necessary labour and materials, and placed a derrick hulk at

ASSESSMENT TO POOR-RATE—*continued.*
such moorings, which had continued there for some years, and was used by the plaintiffs for the purposes of unloading and re-loading coal in the course of their business as coal merchants. The moorings so laid down consisted of anchors and stones, which were laid down in deep holes, dug in the bed of the river, and covered in with large quantities of ballast. The moorings so formed were of a permanent character, and it would have been impossible for the derrick using them to weigh them in the ordinary way in which ships weigh anchor:—*Held*, reversing the decision of the Court below, that the plaintiffs were the occupiers of the moorings, and were liable to be rated in respect of such occupation. Cory *v.* Bristow - - - - C. A. 54

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BUILDING CONTRACT—*Interpretation of Contract—Penalty for Delay—Notice to avoid the Contract—Forfeiture of Implements and Materials.*] A building contract by which the plaintiffs contracted with the defendants to construct a dock and other works in connection therewith, provided as follows:—"Should the contractor fail to proceed in the execution of the works in the manner and at the rate of progress required by the engineer, or to maintain the said works, as hereinafter mentioned, to the satisfaction of the engineer, his contract shall, at the option of the company but not otherwise, be considered void as far as relates to the works or maintenance remaining to be done; and all sums of money that may be due to the contractor, together with all materials and implements in his possession and all sums named as penalties for the non-fulfilment of

BUILDING CONTRACT—*continued.*
the contract, shall be forfeited to the company, and the amount shall be considered as ascertained damages for breach of contract." The contract provided that "the whole of the works should be entirely completed on or before the 31st of August, 1873." The works were not completed by that date.—There were other clauses in the contract in the following terms:—"If the contractors shall not complete the said works within the period limited for the purpose, or if they shall become bankrupt, or if from any cause whatever (not arising from any acts done or omitted to be done by the said company contrary to the true intent and meaning of these presents) they shall be delayed or prevented in the completion of the said works according to the specification, it shall be lawful for the company, without any previous notice, to take the works entirely or in part out of their hands, and to employ any other contractor to complete the same.—Should the engineer be at any time dissatisfied with the nature or mode of proceeding with, or at the rate of progress or maintenance of, the works, or any part thereof, he shall have full power to procure and make use of all labour and materials from the money that may then be due or that may become due to the contractor, but it is hereby expressly declared that the possession of this power by the engineer shall not in any degree relieve the contractor from his obligation to proceed in the execution of and complete the works with the requisite expedition or to maintain them as hereinafter mentioned."—On the 22nd of January, 1874, and consequently after the time fixed by the contract for completion of the works, the defendants gave notice to the plaintiffs to avoid the contract and thereupon took possession of the works and of the materials and implements of the plaintiffs:—*Held*, that upon the true construction of the contract the clause above set forth, with reference to the avoidance of the contract and the forfeiture of the contractor's implements and materials, could only be enforced before the time originally fixed for completion of the works had expired.—*Roberts* v. *Bury Improvement Commissioners* (Law Rep. 4 C. P. 755), distinguished. WALKER *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY - 518

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CAUSE OF ACTION—*Mayor's Court, London, Jurisdiction of—Order for Goods by a Letter posted in the City, accepted by Delivery in the City.*] The defendant, who carried on business in the city of London, posted a letter there containing an order for goods, addressed to the plaintiff in Surrey. No letter was sent accepting the offer; but the goods were taken by a servant of the plaintiff and delivered to the defendant in London:—*Held*, that the whole cause of action arose in the city. TAYLOR *v.* JONES - - - - 87

2. —— *Mayor's Court, London—Prohibition—Account stated within the City.*] The defendant ordered goods of the plaintiff's traveller in Battersea, and they were delivered to him at his place of business in Battersea, where he resided. There was no statement as to the place from which the goods were sent; but, after they had been received by him, the defendant, in answer to a letter written to him by the plaintiff's solicitor in King William Street, City, demanding payment of the price, 8*l.* 8*s.* 6*d.*, wrote to the solicitor (whether by post or otherwise did not appear),—"I will call at your office in the early part of next week, and hope to make some satisfactory arrangement for the payment of Mr. Taylor's claim." Upon a rule for a prohibition to restrain the proceedings in an action brought in the Mayor's Court "for goods sold and delivered at the defendant's request, and upon accounts stated:"—*Held*, a sufficient admission of the debt to support an account stated, and to warrant the Court in assuming that there was a cause of action arising within the jurisdiction of the Mayor's Court. TAYLOR *v.* NICHOLLS. 242

CESSER OF CHARTERERS' LIABILITY—*Ship—Construction of Charterparty—Demurrage—Lien for Freight.*] The defendants chartered a ship to carry a cargo of rice from Akyab to a "good and safe port" in the United Kingdom, &c., calling at Queenstown or Falmouth for orders, which were to be forwarded within forty-eight hours after notice of her arrival. The charterparty contained the following clause,—"It is further agreed that the liability of the charterers shall cease as soon as the cargo is on board, provided the same is worth the freight at port of discharge; but the owners of the ship to have an absolute lien on the cargo for all freight, dead-freight, and demurrage, which they shall be bound to exercise."—In an action against the charterers (who had sold the cargo before arrival) two breaches were assigned,—1. that the defendants or their agents failed to give orders as to the ship's port of discharge,—

CESSER OF CHARTERERS' LIABILITY—*contd.*
2. that they gave orders for the ship to discharge at a port which was not a "good and safe port" within the meaning of the charterparty; whereby the plaintiffs were delayed and put to expense in obtaining payment of the freight:—*Held*, on demurrer, that the above clause discharged the charterers from all liability for acts and defaults of themselves or their agents happening after as well as before the ship was loaded, whether covered by the owners' lien or not. French *v.* Gerber. [737

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CHEQUE—*Principal and Agent—Agent's Authority to receive Cheques—Absence of Authority to indorse*—16 & 17 *Vict. c.* 59, *s.* 19—*Indorsement "per Procuration" or "as Agent.*] An indorsement of a cheque "per procuration" or "as agent," purports to be an indorsement by the payee within 16 & 17 Vict. c. 59, s. 19, so as to protect the banker who has paid it, though the person by whom such indorsement is actually made has no authority to indorse.—K., an agent of the plaintiffs, having authority to sell goods for them and to receive payment in cash or by cheque, but having no authority to indorse cheques, received from the defendants a cheque on their bankers drawn payable to "S. & Co. (the name of the plaintiff's firm) or order," and fraudulently indorsed it "S. & Co., per S. K., agent," and misappropriated the proceeds. The bankers having paid the cheque and returned it to the defendants and charged the amount to their account:—*Held*, that such payment by the bankers was a payment within the protection of the statute, and that the plaintiffs could not sue the defendants either for the price of the goods or for an alleged conversion of the cheque. Charles *v.* Blackwell - 548

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COMMISSION OF AGENT—*Principal and Agent—Agent's Right to Commission—Effect of Admissions at the Trial.*] The defendant, being in want of additional capital in his business, on the 10th of June, 1873, wrote to the plaintiffs (accountants in London with whom he had been in correspondence on the subject) as follows:—"The premises of the B. Works in this town are my property solely, but the business of it is carried on by myself and my partner. In case of your introducing a purchaser of all the premises, or part of them, of whom I shall approve, or in case of your introducing capital which I should accept, I could pay you a commission of 5 per cent. on the amount in either case, provided no one else is entitled to a commission in respect of the same introduction." The plaintiffs succeeded in introducing one W. to the defendant, who advanced him by way of loan a sum of 10,000*l.*, upon which the plaintiffs received the agreed commission. Some few months afterwards the defendant and W. entered into an agreement for a partnership, on which occasion W. made a further advance of £4000*l.* by way of capital to the concern. The plaintiffs claimed commission upon this further advance; and, in an action brought to enforce their claim, they admitted that the advance of the 4000*l.* was not contemplated at the time of the advance of the 10,000*l.*, but that the 4000*l.* was advanced solely in consequence of the negotiation for the partnership between the defendant and W.:—*Held*, that the plaintiffs were not entitled to commission on this second advance. Tribe *v.* Taylor - 505

COMMON CARRIER—*Liability of Shipowner—Act of God.*] The defendant, a common carrier by sea from London to Aberdeen, received from the plaintiff a mare to be carried to Aberdeen for hire. In the course of the voyage the ship encountered rough weather, and the mare received such injuries that she died. The jury found that the injuries were caused partly by more than ordinary bad weather, and partly by the conduct of the mare herself by reason of fright and consequent struggling, without any negligence of the defendant's servants:—*Held*, reversing the decision of the Court below, that the defendant was not liable for the death of the mare.—The carrier does not insure against the irresistible act of nature, nor against defects in the thing carried itself; and if he can shew that either the act of nature or the defect of the thing itself, or both taken together, formed the sole, direct, and irresistible cause of the loss, he is discharged. In order to shew that the cause of the loss was irresistible it is not necessary to prove that it was absolutely impossible for the carrier to prevent it, but it is sufficient to prove that by no reasonable precaution under the circumstances could it have been prevented.—Per Cockburn, C.J.: A shipowner, who is not a common carrier, is not subject to the liability of a common carrier—i.e. does not insure the goods bailed to him for carriage.—The question what amounts to an "act of God" within the meaning of that expression, as applied to the carrier's exemption, discussed. Nugent *v.* Smith [C. A. 423

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COMPENSATION UNDER LANDS CLAUSES ACT—*Compensation—Lands Clauses Consolidation Act*, 1845—*Power of Arbitrator to state Case—Evidence that Award is for proper Subject of Compensation—Private Act containing special compensation Clauses.*] The umpire in an arbitration under the Lands Clauses Consolidation Act, 1845, in which each party had appointed an arbitrator, made his award in the form of a special case for the opinion of a superior court:—*Held*, reversing the decision of the Common Pleas, that he had the

COMPENSATION UNDER LANDS CLAUSES ACT —*continued.*

power to state a case, the appointment of an arbitrator being, by the terms of sect. 25, a submission to arbitration on the part of the party by whom the same is made, and the arbitration being, therefore, an arbitration by consent within sect. 5 of the Common Law Procedure Act, 1854.—*Semble*, that in an action on an award under the Lands Clauses Consolidation Act, 1845, when the defendants plead that the compensation awarded is in respect of matters not the subject of compensation, the award is not evidence that the compensation awarded is in respect of matters the subject of compensation.—A private Act, incorporating the Lands Clauses Consolidation Act, 1845, contained special clauses giving compensation for "damage" caused by the exercise of the powers of the Act to the proprietors of certain specified estates:—*Held*, on the construction of these clauses, that they were limited to damage which, but for the Act, would have been actionable. RHODES *v.* THE AIREDALE DRAINAGE COMMISSIONERS - - - 380, C. A. 402

2. —— *Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 9, 22—*Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 6, 12—*Permanent Injury to Land by the taking of Water—Assessment of Compensation—Tenant for Life—Ultra vires.*] Sect. 9 of the Lands Clauses Consolidation Act, 1845, applies as well to the case of "permanent injury to land" in the occupation of a tenant for life as to that of "lands purchased or taken."—Under a local waterworks Act, which incorporated the Lands Clauses Consolidation Act, 1845, and the Waterworks Clauses Act, 1847, the promoters (a corporation) were empowered to take, use, divert, and appropriate certain streams, amongst others a stream necessary for the working of a mill of which the plaintiff was tenant for life. In September, 1872, they gave the plaintiff notice of their intention to divert *the whole* of the stream, and in April, 1874, by an agreement professing to be made under the powers of the special Act, it was referred to two surveyors to determine "the amount of compensation money to be now paid by the corporation for the damage which the owner or owners for the time being of the said premises may sustain by the abstraction of the whole of the said streams, springs, and waters which the said corporation are so as aforesaid authorized to take, use, divert, and appropriate for the purposes of the said waterworks," &c. The valuers so named not agreeing, a third was appointed by two justices (under s. 9 of the Lands Clauses Consolidation Act, 1845), who awarded that "the sum of 939*l.* 5*s.* is the compensation money to be paid by the above-named corporation for the permanent damage and injury which the owner or owners for the time being of the abovementioned mill, lands, and premises may have sustained or shall or may sustain by the abstraction of *the whole* of the streams," &c.:—*Held*, on demurrer to a statement of claim in an action to recover the sum so awarded, that this was a good valuation under s. 9 of the Lands Clauses Consolidation Act, 1845, and that the agreement by the corporation to refer was not ultra vires. STONE *v.* THE MAYOR, ALDERMEN, AND BURGESSES OF YEOVIL - - - - - - - 691

COMPOSITION—*Bankrupt—Resolution for a Composition by Promissory Notes with a Surety—Default in Payment—*32 & 33 *Vict. c.* 71, *ss.* 125, 126.] Defendant having filed a petition for liquidation under s. 126 of the Bankruptcy Act, 1869, at a meeting duly convened (the plaintiffs being assenting creditors), resolutions were passed, that a composition of 3*s.* in the pound should be accepted by the creditors in satisfaction of their debts, that such composition should be payable by instalments at three, six, and twelve months, and that the security of S. should be accepted for the whole of the composition; and a trustee was appointed.—Joint and several promissory notes of defendant and S. for the composition, payable at the National Provincial Bank of England at Birmingham, were given to plaintiffs and the other creditors, and receipts signed by them, expressing it to be "in discharge of their debts."—The first note was presented at the bank at maturity, and dishonoured, but no demand was made upon S. or the trustee:—*Held*, that the plaintiffs were remitted to their right to sue for their original debt, —the mere giving of the notes, without payment, not being satisfaction within the terms of the resolution or the receipt. EDWARDS *v.* HANCHER 111

2. —— *Bankruptcy — Composition—Non-payment of Composition by Trustee—Name and Address of Creditor not inserted in Statement of Debtor —Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 126.] The Bankruptcy Act, 1869, s. 126, provides that "the creditors of a debtor unable to pay his debts may, without proceedings in bankruptcy, by an extraordinary resolution, resolve that a composition shall be accepted in satisfaction of the debts due to them from the debtor." It provides that the extraordinary resolution may be passed by a certain majority in number, and three-fourths in value, of the creditors at a meeting to be summoned in a certain way, and makes other provisions as to the conduct of the proceedings, and then enacts that "the provisions of a composition accepted by an extraordinary resolution in pursuance of this section shall be binding on all the creditors whose names and addresses, and the amount of the debts due to whom, are shewn in the statement of the debtor produced to the meetings at which the resolution has passed, but shall not affect or prejudice the rights of any other creditor:"—*Held*, that the provision as to the insertion of the names, &c., of creditors in the debtor's statement only applies to non-assentient creditors, and that creditors who voluntarily come in and join in passing the resolution for the composition are bound, although their names, &c., are not inserted.—To an action by the plaintiffs, as indorsees of a bill of exchange, against the defendants as acceptors, the defendants pleaded that the necessary proceedings for a composition by the defendants under s. 126 had been taken, and that a trustee on behalf of the creditors had been appointed by the extraordinary resolution for receipt and distribution of the composition, and that a sum sufficient to pay the composition had been duly paid to the trustee for the purpose of his paying the same pursuant to the resolution, the plaintiffs replied that the amount of the composition due to them was not paid or tendered to them, but the trustee, by the direction, request, and procurement of the defendants, refused to pay

COMPOSITION—*continued.*
the same to the plaintiffs:—*Held*, a bad replication, on the ground that the defendants were discharged on the payment to the trustee of money applicable to and sufficient to pay the composition. The mere non-payment by the trustee does not defeat the composition, and the money being impressed with a trust for the benefit of the creditor, any direction by the debtor with respect to it is a nullity.—*Semble*, the trustee is entitled before paying over the composition to a creditor to investigate the validity of his claim. CAMPBELL *v.* IM THURN - - - - - - 267

CONCEALMENT OF MATERIAL FACT—Lease—Title - - - - - 145
See COUNTER-CLAIM.

CONDITION ON TICKET—*Railway Company—Bailment—Deposit of Property in Cloak room—Ticket—Condition indorsed thereon—"See Back."*] On the deposit of articles at the cloak-room at a railway-station, a charge is made of 2*d.* for each, and the depositor receives a ticket on the face of which is printed the times of opening and closing the cloak-room, and the words "See Back;" and on the back there is a notice that "the company will not be responsible for any package exceeding the value of 10*l.*" A placard, upon which is printed in legible characters the same condition, is also hung up in a conspicuous place in the cloak-room.—The plaintiff deposited his bag (of the value of 24*l.* 12*s.*) in the defendants' cloak-room, paid 2*d.*, and received a ticket. The bag was lost or stolen. In an action to recover its value, the plaintiff swore that, on receiving the ticket, he placed it in his pocket without reading it, imagining it to be only a receipt for the money paid for the deposit of the article; that he did not see the condition at the back of the ticket; nor did he see the notice hung up in the cloak-room. The judge left two questions to the jury, —1. Did the plaintiff read or was he aware of the special condition upon which the article was deposited? 2. Was the plaintiff, under the circumstances, under any obligation, in the exercise of reasonable and proper caution, to read or to make himself aware of the condition?—The jury answered both questions in the negative, and a verdict was entered for the plaintiff:—*Held*, that, upon these facts and findings, the company were responsible for the loss of the bag.—Mere notice, not brought home to and assented to by the depositor, is not enough in such a case to relieve the company from liability.—*Henderson* v. *Stevenson* (Law Rep. 2 H. L., Sc. 470) commented upon. PARKER *v.* THE SOUTH EASTERN RAILWAY COMPANY - - - - - - 618

CONSIDERATION—Contract—Agent - 533
See CONTRACT BY AGENT. 2.

CONSTRUCTIVE TOTAL LOSS—Sale by foreign court - - - - 358
See FOREIGN JUDGMENT.

CONTRACT—Agent—Liability 100, C. A. 374, *See* CONTRACT BY AGENT. 1, 2. [533

—— Agent—Ratification - - C. A. 757
See CONTRACT BY AGENT. 3.

—— Building—Penalties - - - 518
See BUILDING CONTRACT.

CONTRACT—*continued.*
—— Consideration—Agent - - 533
See CONTRACT BY AGENT. 2.

—— Hiring—Dismissal - - - 591
See DISMISSAL OF SERVANT.

—— Illegality—Fraud - - - 265
See FRAUD ON CREDITORS.

—— Infant—Ratification - - - 568
See RATIFICATION BY INFANT.

—— Railway company—Unpunctuality C. A. 286
See UNPUNCTUALITY OF TRAIN.

—— Ticket—Condition - - - 618
See CONDITION ON TICKET.

CONTRACT BY AGENT—*Sale of Goods—Principal and Agent—Personal Liability of Broker.*] The defendant, a broker, signed and sent to the plaintiffs a note of a contract in the following terms:—"I have this day sold by your order and for your account to my principals five tons of . . . . anthracene . . . . W. A. Bowditch." In an action for goods sold and delivered:—*Held*, reversing the judgment of the Common Pleas Division, that, in the absence of usage making the defendant personally liable, the defendant was not personally liable upon the contract. SOUTHWELL *v.* BOWDITCH - 100, C. A. 374

2. —— *Principal and Agent—Contract—Consideration.*] B., W., & Co., who had contracted with a colliery company for 10,000 tons of coal to be delivered over a period of three months at a spout on the Tyne, "the turn to be mutually agreed upon," proposed to charter a foreign ship for the conveyance of 29 keels to Elsinore, and tendered to the captain a charterparty which stipulated for demurrage in unloading the ship, but made no provision for detention in loading her. The captain declined to sign such a charter, without an assurance that there should be no undue detention of his ship; and thereupon B., W., & Co. obtained from the defendant (who was a clerk employed by several colliery companies to arrange the turns for loading) the following undertaking,—"I undertake to load the ship *Der Versuch*, 29 keels, with Bebside coals in ten colliery working days, &c. On account of Bebside Colliery, W. S. Hoggett."—This memorandum (which made no mention of the person contracted with) was communicated by the charterers to the captain of *Der Versuch*, who thereupon accepted the charter. The vessel being detained in loading beyond the stipulated ten days, the captain called upon the defendant to pay him 45*l.* for demurrage. The defendant repudiated all liability, but ultimately offered to pay the captain 20*l.* The defendant had no notice of the charter. In an action by the captain to recover 45*l.* for demurrage from the defendant:—*Held*, that, upon these facts, a jury were warranted in finding that the undertaking to load within ten days was a contract between the captain and the defendant; that there was sufficient consideration for it; and that the contract was with the defendant personally, and not as agent. WEIDNER *v.* HOGGETT - - - - - 533

3. —— *Marine Insurance—Ratification with Knowledge of Loss—Valued Policy—Opening Valuation.*] Where a policy of marine insurance is made by one person on behalf of another without authority, it may be ratified after the loss of

CONTRACT BY AGENT—*continued.*
the thing insured by the party on whose behalf it is made, though he know of the loss at the time of such ratification.—Where there was a valued policy on "freight":—*Held*, that the rule that the valuation in a valued policy is conclusive did not prevent the Court from looking into the elements of which the valuation was made up to ascertain whether the freight intended to be so valued was the full freight, or the freight after deducting certain advances made against freight by the charterers' agents to the captain, such question becoming material for the purpose of ascertaining whether the shipowner was interested in the whole of the subject-matter of insurance, and whether to any extent the loss had been satisfied under another policy of insurance effected by the charterers on the said advances against freight. Williams *v.* The North China Insurance Company - - - - C. A. 757

CONVERSION—Servant or sub-contractor [C. A. 482
See Negligence of Servant. 3.

COPYHOLD—Enfranchisement - - 609
See Enfranchisement.

CORPORATION—Foreign attachment - 1
See Foreign Attachment.

COSTS—Defending action—Damages - 511
See Remoteness of Damages. 2.

—— Security—Appeal - - - 556
See Negligence of Servant. 2.

—— Security—Appeal - - C. A. 143
See Security for Costs.

—— Solicitor's lien - - - -
See Solicitor's Lien.

COUNTER-CLAIM—*Lessor and Lessee—Absence of Title to Part of Premises demised—Concealment—Equity to have the Lease set aside—Implied Covenant for Title, Damages for Breach of—Right of Lessee to reject Part of demised Premises—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *ss.* 24, 34 — *Order XIX., Rule* 3 — *Jurisdiction.*] Where the defendant in an action in one of the Divisions of the High Court of Justice other than the Chancery Division relies on an equity to have a deed set aside as part of his defence, the Division in which the action is may give effect to the equity so far as is incidental to the purposes of the defence.—It is not essential to a good counter-claim that it should shew a claim to an amount equalling the plaintiff's claim. The lessor of certain lands knew that as to part of them he had no title to grant the lease.—The lessee did not know, and had no means of knowing, that such was the case, and the lessor did not disclose the want of title to him:—*Held*, that it was not necessary in equity, in order that the lessee might be relieved of the lease, that there should have been any affirmative fraud, and that the concealment by the lessor of a fact affecting the title to a material part of the demised premises was a sufficient ground for treating the lease as set aside.—A lease having been granted by deeds in terms from which the law implies a covenant for title, and the lessor proving to have no title to part of the demised premises:—*Held*, that the lessee might refuse to take possession of such part of the demised premises, and elect to keep the remainder, and might in an action for rent due under the lease claim damages for breach of the implied covenant by way of counter-claim. Mostyn *v.* The West Mostyn Coal and Iron Company - - - - - 145

—— Set-off - - - - - 496
See Set-off.

COUNTERPART—Lease—Discrepancy - 602
See Habendum.

COUNTY COURT—Appeal—Case - - 70
See County Court Appeal.

—— Jurisdiction—Debtors Act - - 229
See Arrest of Debtor. 1.

COUNTY COURT APPEAL—*Rule calling upon the Judge, under* 19 & 20 *Vict. c.* 108, *s.* 43, *to settle and sign a Case—Discretion of Court—Appeal under* 38 & 39 *Vict. c.* 77, *Order LVIII., Rule* 10.] The granting or refusing a rule calling upon a judge of a county court to settle and sign a case on appeal, under 19 & 20 Vict. c. 108, s. 43, is discretionary; and the Court is justified in refusing a rule where it plainly appears that no question of law can arise thereon.—The decision of the Court refusing such a rule upheld by the High Court of Appeal, on a motion under the Judicature Act, 1875 (38 & 39 Vict. c. 77), Order LVIII., Rule 10. Sharrock *v.* The London and North Western Railway Company - - - - - 70

COUNTY COURT JURISDICTION—Debtors Act
See Arrest of Debtor. 1. [229

COUNTY VOTE—Parliament - 178, 192, 195
See Vote for Parliament. 1, 2, 3.

COVENANT FOR TITLE—Implied - - 145
See Counter-claim.

COVENANT TO REPAIR—*Construction of Private Act—Notice.*] The defendants' predecessors in title obtained an Act for the formation of a road which was to pass under a railway by means of a bridge. By the Act it was provided that the undertakers should not enter upon or interfere with the railway, or execute any work whatsoever under or affecting the same, until they should have delivered to the company plans, drawings, and specifications of the works intended to be executed under or affecting the railway and works thereof, such plans, &c., to describe the manner of executing the intended works, and the materials to be used for the purpose, nor until those plans, &c., should have been examined and approved by the engineer of the company; and that "the same works should be executed and thereafter maintained by the undertakers at their sole expense in all things, according to such approved plans, &c., under the superintendence and to the reasonable satisfaction of the engineer of the company." And it was further provided that the undertakers should from time to time be responsible for and make good to the company all costs, losses, damages, and expenses which might be occasioned to the company by reason of the execution or failure of any of the intended works, or of any act or omission of the undertakers, &c. —The bridge was accordingly constructed of brick piers and iron pillars, of iron girders resting upon the piers and pillars, and of timber and woodwork. In the construction of the bridge, the

COVENANT TO REPAIR—*continued.*
brick and iron work was done by the defendants' predecessors in title, under the superintendence of the plaintiffs' engineer. The timber and woodwork,—the superstructure,—was done by the plaintiffs' engineer at the expense of the undertakers, and with materials provided by them.—The structure was completed in 1864. In 1872 certain repairs became necessary to the superstructure of the bridge, which repairs were executed by the company, who claimed to be reimbursed their outlay in so doing by the defendants, although the defendants had had no notice nor any knowledge or means of ascertaining that the repairs were necessary:—*Held*, that the plaintiffs were not entitled to recover the expenses so incurred. The London and South Western Railway Company *v.* Cyril Flower - - 77

2. —— *Landlord and Tenant—Ejectment for a Forfeiture—Assignee of Reversion—Non-repair—Notice of the Assignment*—32 *Hen.* 8, *c.* 34.] The assignee of the reversion of a lease may maintain ejectment for breach of a covenant to repair, without giving the tenant notice of the assignment. Scaltock *v.* Harston - - - 106

3. —— *Lease—Forfeiture for Non-repair—Relief in Equity—Notice to repair, Suspension of—Negotiation for Purchase of Premises—Tenant misled by Landlord's Conduct.*] Equity will relieve a lessee against forfeiture for breach of a covenant to repair when the landlord has by his conduct misled the lessee into supposing that the covenant would not be insisted on.—A lease of certain premises contained a covenant to repair upon six months' notice and a condition of reentry for breach. The defendants became sublessees of the premises under a lease containing a similar covenant. The premises being out of repair, the plaintiff, who was the reversioner, gave notice to the defendants on the 22nd of October, 1874, to repair within six months. The defendants wrote to the plaintiff suggesting that he should purchase their interest, and stating that they should postpone the repairs until they heard from him on the subject. Negotiations thereupon took place with reference to a purchase of the defendants' interest by the plaintiff, and finally the plaintiff wrote on the 31st of December to the defendants, stating that the price they asked was out of all reason, having regard to the expenditure which would be required to put the premises into proper condition, and which the defendants would have to bear under their covenants, and requesting the defendants to reconsider the question of price, and to make some modified proposal. No further proposal was made by the defendants, and though some further correspondence took place with regard to the premises, the plaintiff never intimated to the defendants that he considered the negotiations at an end. On the 13th of April, 1875, the plaintiff wrote to the defendants' lessor stating that the six months' notice would expire on the 21st. The defendants thereupon caused the premises to be repaired, and the repairs were completed in June, 1875. The plaintiff brought an action of ejectment in respect of the premises, and recovered judgment therein, and the defendants sought relief against the forfeiture.—The Common Pleas Division held that the negotiations were finally

COVENANT TO REPAIR—*continued.*
broken off on the 31st of December, no further proposal having been made by the defendants; that the effect of the correspondence was only to give the defendants a reasonable time for repairing after that period; and that, inasmuch as the interval between the 31st of December and the 21st of April was a reasonable time for that purpose, the defendants were not entitled to relief:—*Held*, by the Court of Appeal (reversing the decision of the Common Pleas), that the true construction of what had taken place was that the notice to repair was suspended during the negotiations, that the negotiations were not finally broken off on the 31st of December, and that the plaintiff by his conduct had misled the defendants into supposing that the notice to repair was still suspended, and that he was not insisting on the breach of the covenant, and, consequently, that it would be inequitable to permit him to take advantage of the forfeiture. Hughes *v.* The Metropolitan Railway Company [C. A. 120

CUSTOM OF TRADE—Foreigner - - 654
See Demurrage.

DAMAGES—Remoteness - - 92, 511
See Remoteness of Damages. 1, 2.

—— Remoteness—Delay of train - C. A. 286
See Unpunctuality of Train.

—— Remoteness—Telegraph message - 326
See Remoteness of Damages.

DEBTORS ACT, 1869, s. 5 - - 169, 229
See Arrest of Debtor. 1, 2.

DEFAMATION—Privilege—Witness - 540
See Privileged Communication.

DELIVERY ORDER—Estoppel - - 445
See Estoppel by Contract.

DEMURRAGE—*Shipping—Charterparty, Construction of—Arrival of Ship—Commencement of Lay-Days—Local Custom—Foreigner.*] Timber was consigned, under a charterparty made at Riga, to the Canada Dock in the port of Liverpool, a given number of days being allowed for unloading there:—*Held*, that, by the general law, the lay-days commenced from the time the ship arrived in the dock; but that it was competent to the consignee to shew, notwithstanding the plaintiff was a foreigner, that there was a custom in the port of Liverpool, that, in the case of timber ships, the lay-days commenced only from the mooring of the vessel at the quay where by the regulations of the dock she was alone allowed to discharge. The Steamship Company "Norden" *v.* Dempsey - - - - - 654

DESCRIPTION—Bill of sale - - 60
See Affidavit with Bill of Sale. 1.

DETENTION OF SHIP—Unseaworthiness 452
See Unseaworthy Ship.

DILAPIDATIONS—Simony - - C. A. 638
See Simony.

DISCHARGE OF SURETY—*Principal and Surety—Discharge of Surety by Time given to Principal—Contract for Performance at several distinct Times.*] Although where one enters into a bond as surety for the performance by another of two things which are separate and distinct, a subsequent alteration of the principal's contract as to

DISCHARGE OF SURETY—*continued.*
one of them without the surety's consent does not release the surety from his contract of suretyship as to the other, yet, where the contract is one entire contract for the performance by the principal of two or more things at different times, if by any dealing with the principal without the consent of the surety the latter is discharged as to one of them, his liability as surety is altogether released.—When once a surety is relieved from the obligation which he has undertaken, that obligation cannot be renewed by any subsequent act to which he is no party.—D. contracted with a gas company to take from them tar and ammoniacal liquor, and to pay for each month's supply within the first fourteen days of the ensuing month after the account rendered, "unless the company should by writing signed by their secretary allow a longer time for payment." The defendant became surety for the performance of the contract by D.—On the 3rd of August an account was delivered for the July supply; and after the fourteen days had expired, viz. on the 21st, the secretary of the company, without the knowledge of the surety, sent D. a letter inclosing a promissory note at a month for the amount, with a request that he would sign and return it. D. signed the promissory note and returned it to the secretary, who kept it:—*Held*, that, assuming this to be a giving of time "by writing signed by the secretary," within the meaning of the agreement, being after breach the surety was released; and that, once released, he was not liable in respect of debts contracted in respect of subsequent months' supplies. THE CROYDON COMMERCIAL GAS COMPANY *v.* DICKINSON - - - - - - - 707

DISCOVERY—Documents—Privilege - 471
See PRODUCTION OF DOCUMENTS.

DISMISSAL OF SERVANT—*Master and Servant—Contract of Hiring—Wrongful Dismissal.*] The plaintiff, a master mariner, accepted the command of the defendant's ship under a written agreement, as follows:—"I hereby accept the command of the ship *City Camp* on the following terms: Salary to be at and after the rate of 180*l.* sterling per annum." "Should owners require captain to leave the ship abroad, his wages to cease on the day he is required to give up the command, and the owners have the option of paying or not paying his expenses travelling home." "Wages to begin when captain joins the ship:"—*Held*, that the plaintiff could not (except under unusual circumstances) be so dismissed without a reasonable notice. CREEN *v.* WRIGHT [591

DISTRESS—Crops—Sale - - - 280
See SALE OF DISTRESS.

DISTRICT REGISTRY—Writ—Bills of Exchange Act - - - - - 334
See WRIT UNDER BILLS OF EXCHANGE ACT.

DIVISIONAL COURT—*Appeal—Judge*—38 & 39 *Vict. c.* 77, *s.* 4.] An appeal can be heard by the Court of Appeal, although one of the judges then in the Court is a judge of the Division in which the action is pending, if he has taken no part in making the order appealed from. FISHER *v.* THE VAL TRAVERS ASPHALTE COMPANY [C. A. 259

ECCLESIASTICAL DILAPIDATIONS—Simony
See SIMONY. [C. A. 638

EJECTMENT—Assignee of reversion—Notice 186
See COVENANT TO REPAIR. 2.

—— Forfeiture—Equitable defence C. A. 120
See COVENANT TO REPAIR. 3.

ELECTION, MUNICIPAL—Nomination-paper [596, 670
See ELECTION OF TOWN COUNCILLOR. 1, 2, 3.

ELECTION, PARLIAMENTARY.
See Cases collected under VOTE FOR PARLIAMENT.

—— Petition - - - - - 410
See ELECTION PETITION.

ELECTION OF TOWN COUNCILLOR—*Municipal Elections Act*, 1875 (38 & 39 *Vict. c.* 40), *s.* 1, *subs.* 3—*Nomination papers delivered by an Agent—Petition questioning Decision of Mayor*—22 *Vict. c.* 35, *s.* 8.] Under the Municipal Elections Act, 1875 (38 & 39 Vict. c. 40), s. 1, subs. 3, the nomination-paper must be delivered to the town-clerk by the candidate himself, or by his proposer or seconder personally, and not by an agent. And the objection is one which is cognizable by the mayor, whose decision allowing it may be questioned on a petition against the return of the successful candidate. MONKS *v.* JACKSON 683

2. —— *Municipal Corporations Act* (6 & 7 *Wm.* 4, *c.* 76), *s.* 142—*Municipal Elections Act*, 1875 (38 & 39 *Vict. c.* 40), *s.* 1, *subs.* 1, 2, 3, *and s.* 13—*Misnomer of Candidate in Nomination-paper.*] In a nomination-paper at an election for town-councillors of a borough under the Municipal Elections Act, 1875, the name of a candidate, which was Robert Vicars Mather, was inserted thus,—"Robert V. Mather:"—*Held*, not such a statement of "the surname and other names of the persons nominated" as to satisfy the requirements of s. 1 of the Act and the form given in the 2nd schedule; and that the inaccuracy was not cured by s. 142 of 6 & 7 Wm. 4, c. 76. MATHER *v.* BROWN - - - 596

3. —— *Municipal Elections Act*, 1875 (38 & 39 *Vict. c.* 40), *s.* 1, *subs.* 1, 2, *and* 3—*Defective Notice by Town-clerk as to the Time for delivering Nomination-papers—Power and Duty of Mayor—Jurisdiction of the Court—Corrupt Practices (Municipal Elections) Act*, 1872 (35 & 36 *Vict. c.* 60), *ss.* 12, 15—*Avoidance of Election.*] Sect. 1, subss. 1, 2, and 3, of the Municipal Elections Act, 1875, provide that *nine days at least* before any election of town-councillors, the town-clerk shall publish a notice intimating the last day on which nomination-papers (which are to be signed by the candidate, his proposer and seconder, and by eight burgesses, and delivered by the candidate himself or by his proposer and seconder) are to be delivered to him (which day is to be *seven days at least* before the day of election), and the day and hour at which the mayor will attend to hear and determine objections thereto.—At the annual election of town-councillors for 1875, the town-clerk of N. issued a notice in the prescribed form but erroneously stating the last day for the delivery of nomination-papers to be Saturday, the 23rd of October, which did not leave seven *clear* days between that day and the day of election,

ELECTION OF TOWN COUNCILLOR—*continued.*
Nov. 1. W., a candidate for one of the two vacancies, duly delivered his nomination-paper at the town-clerk's office on Friday, the 22nd of October; but, inasmuch as one of the eight burgesses had written one of his Christian names with a contraction, "Fredk.," W., supposing that to be a fatal objection, without notice and without the knowledge of the town-clerk, got the paper back from a clerk in the office and returned it on the following day re-signed by the burgess. T., another candidate, delivered his nomination-paper on Saturday, the 23rd. H. and P., two other candidates who had duly delivered their nomination-papers on Friday, the 22nd, objected to the allowance of the nomination-papers of W. and T. The mayor (assuming to have authority to hear it) disallowed the objection, and the result of the poll was that W. and T. were declared duly elected. H. and P. thereupon filed a petition against this return, but did not claim to be seated. —Upon a special case setting out the facts for the opinion of the Court:—*Held*, 1. That the mayor had no power to deal with the objection as to the time of delivering the nomination-papers, and that his decision might be questioned on petition.—2. That the nomination-paper of W. must be taken to have been delivered on Friday, the 22nd, and was therefore in time, the taking it away for an unnecessary alteration not being done with intent to withdraw it.—3. That the nomination-paper of T., though delivered in accordance with the terms of the town-clerk's notice, was delivered too late.—4. That the notice published by the town-clerk being so defective as to be calculated in the opinion of the Court to mislead the candidates and so prevent a fair election, the whole proceeding must be declared void and a new election ordered. Howes *v.* Turner 670

ELECTION PETITION — *Borough Election — Amendment of Petition by striking out Claim for Seat.*] This Court will not amend an election petition by striking out, after the lapse of the time limited by the Act for presenting it, that part of the prayer of the petition which claims the seat for the petitioner (an unsuccessful candidate) and the allegations applying to a scrutiny which would be dependent thereon, inasmuch as this would affect the rights of the constituency.—Practice of election committees in this respect followed.—*Semble*, that it is competent to this Court to amend an election petition at any time by striking out allegations therein, where it is satisfied that no injurious result, or a beneficial one, will follow; or by adding matters discovered after the filing of the petition. Aldridge *v.* Hurst - - - - - - 410

ENFRANCHISEMENT — *Copyhold — Compulsory Enfranchisement—Death of Tenant before Confirmation of Award—Lord's Fine—4 & 5 Vict. c. 35; 15 & 16 Vict. c. 51; 21 & 22 Vict. c. 94.*] A copyhold tenant died after proceedings instituted by him for a compulsory enfranchisement under the Copyhold Act, 1858 (21 & 22 Vict. c. 94), and before the confirmation of the award by the commissioners:—*Held*, that the lord was entitled to have a new tenant on the roll and to a fine on his admittance.—*Held*, also, that the proceedings did not abate by the death of the first tenant. Myers *v.* Hodgson - - - - - - 609

ESTOPPEL—Notice to repair—Suspension *See* Covenant to repair. 3. C. A. [120

—— Sale of goods—Delivery orders *See* Estoppel by Conduct. - 445

ESTOPPEL BY CONDUCT — *Contract of Sale—Unappropriated Goods—Undertaking to deliver to Vendee's Order—Unpaid Vendor—Estoppel.*] The defendants sold to B. & Co. 100 tons of zinc (unappropriated) upon certain terms of payment, giving them at the time of the contract four several documents to the following effect:—"We hereby undertake to deliver to your order indorsed hereon twenty-five tons merchantable sheet zinc off your contract of this date." Upon the faith of these documents, the plaintiffs bought of B. & Co., and paid for, fifty tons of the zinc mentioned in the contract. B. & Co. having failed, and the contract price being unpaid, the defendants refused to deliver the zinc:—*Held*, that the giving of these delivery orders or "undertakings" did not estop the defendants from setting up, as against the vendees of B. & Co, their right, as unpaid vendors, to withhold delivery. Farmeloe *v.* Bain - - - - - - 445

2. —— *Money received by Means of a forged Indorsement—Negligence in the Custody or Transmission of Securities by Post—Estoppel—Conversion.*] Negligence in the custody of a draft or in its transmission by post will not disentitle the owner of it to recover the draft or its proceeds from one who has wrongfully obtained possession of it.—Negligence, to amount to an estoppel, must be in the transaction itself, and be the proximate cause of leading the third party into mistake, and also must be the neglect of some duty which is owing to such third party or to the general public.—The plaintiffs, merchants at New York, desiring to transmit 1000*l.* to W. & Co., of Bradford, purchased of S. & Co. in New York, a draft for that amount drawn by S. & Co. on Smith, Payne, & Co., London, payable to the order of the plaintiffs on demand. The plaintiffs indorsed the draft specially to W. & Co. or order, and inclosed it in a letter addressed to them, which was placed in a letter-box in their office to be posted in the usual way. The letter was stolen by one Hecht, a clerk in the employ of the plaintiffs, who forged an indorsement of W. & Co., and procured the defendants, bankers in London, to present the draft and obtain the money, which was placed by them to the account of a person acting in concert with Hecht, upon whose cheques the money was almost immediately drawn out.—In an action for money had and received, the defendants, in order to shew that the negligence of the plaintiffs in the custody and transmission of the draft afforded facilities for the fraud, and so estopped them from suing for the money, tendered evidence that it was an usual and almost invariable practice amongst merchants sending large remittances from abroad to send, besides the letter containing the remittance, a letter of advice by the same or the next mail. This evidence was rejected, on the ground that the alleged negligence was collateral only to the transaction giving rise to the action:—*Held*, that the plaintiffs' right to the draft, and to sue for the proceeds thereof in the hands of the defendants as money received to their use, was not affected by

ESTOPPEL BY CONDUCT—*continued.*
the felonious act of Hecht; and that the evidence tendered was properly rejected. Arnold *v.* The Cheque Bank. The Same *v.* The City Bank [578

—— Notice to repair—Suspension C. A. 120
See Covenant to repair. 3.

EVIDENCE—Admission—Agent - - 505
See Commission of Agent.

—— Negligence—Defective truck - C. A. 342
See Evidence of Negligence.

EVIDENCE OF NEGLIGENCE—*Railway Company—Defect in Truck—Foreign Truck—Duty to examine.*] The defendants, a railway company, have a junction at Peterborough, at which they receive from other lines a great number of trucks, which they, being bound by law to give facilities for through traffic, are compelled to forward with dispatch to their destination. The defendants when a foreign truck comes on their line, cause it to undergo such a general examination as can take place without causing an undue delay, that is to say, the tires of the wheels are tapped with a hammer, and the truck generally looked over for defects.—A foreign truck, loaded with coal, belonging to the B. Waggon Company, came on to the defendants' line at Peterborough, and there underwent the usual examination, when a defect in one of the springs and a crack in the woodwork was discovered. The truck was shunted, upon the discovery of the defects, in order that it might be repaired by the waggon company to whom it belonged. The defect in the spring, which was the only pressing defect, was repaired, and the truck was handed over to the defendants, and sent on by them to its destination. On the way an accident, by which the plaintiff was injured, happened through the existence of a crack in one of the axles of the truck. It was stated in evidence that by a minute examination of the truck the crack in the axle might have been discovered. The defect in the axle was entirely unconnected with the defects previously discovered. The jury, in answer to questions left them by the judge, found that the crack in the axle might have been discovered by a sufficiently minute examination; but that the defendants were not bound to examine the truck minutely, so as to enable them to see the crack. In answer, however, to a third question left to them, viz. as to whether, although it might not be the defendants' duty on the first view of the truck to examine it minutely, it did not become their duty to do so upon discovery of the defects in the spring and woodwork, the jury answered that it was their duty to require from the waggon company some distinct assurance that the truck had been thoroughly examined and repaired:—*Held*, reversing the decision of the Court below, that on these findings the defendants were entitled to a verdict; for the defendants were not bound to do more in the way of examining the foreign truck on its arrival at Peterborough than they had done, and inasmuch as the defects discovered on such examination were entirely unconnected with the defect that caused the accident, they were not responsible by reason of their failing upon the discovery of such defects to enter upon a more minute examination of the truck, or to make any such inquiry of the waggon company, as suggested by the finding of the jury, Richardson *v.* The Great Eastern Railway Company - - - - - C. A. 342

EXECUTOR—Judgment of Inferior Court - 227
See Removal of Judgment.

—— Notice to creditors - - - 246
See Notice to Creditors.

FELLOW-SERVANT—Negligence - 161, 556
See Negligence of Servant. 1, 2.

FOREIGN ATTACHMENT—*Mayor's Court—Foreign Attachment—Corporation.*] A debt due from a corporation cannot be attached in the Mayor's Court of London by virtue of the custom of foreign attachment, nor can there be a writ of fieri facias against the goods of a corporation as garnishees.—*Semble*, that a corporation cannot be defendants in an action in the Mayor's Court. The London Joint Stock Bank *v.* The Mayor of London - - - - - 1

FOREIGN JUDGMENT—*Marine Insurance—Constructive total Loss—Judgment of foreign Tribunal—Sale of Things insured by Order of foreign Tribunal.*] The presumption with regard to the judgment of a foreign Court is that it is correct according to the law of the country to which it belongs, but when it was admitted by the parties that the law of the foreign tribunal had not been correctly declared by its judgment:—*Held*, that such judgment was not binding on an English court.—The expenses which may be recovered by the assured under the suing and labouring clause in a policy of insurance free of particular average, are confined to the expenses which are necessary to avert a total loss, for which the insurer would be liable.—A sale of the subject-matter of insurance ordered by a foreign tribunal within whose jurisdiction it has been originally thrown by perils insured against, does not amount to a constructive total loss, where the sale is not due to perils insured against, such perils having ceased to operate, but is made for the purpose of repaying advances incurred through the captain's breach of duty in not transhipping the subject-matter of insurance to its destination.—A cargo of rye, shipped on an Austrian ship for carriage from Enos, a Turkish port, to Schiedam, was insured by a policy warranted free of particular average. The ship meeting with stormy weather, a portion of the cargo was damaged, and the ship had to put into the port of La Rochelle. Proceedings were taken, at the instance of the captain, in the Tribunal of Commerce at that port, and, in consequence, the cargo was landed and warehoused. It was necessary to sell a portion of the cargo immediately, which was accordingly done. On the 21st of February the Court, on the petition of the captain, ordered a sale of the residue, and notice of abandonment was given to the defendants as insurers on the ground that, in the opinion of the experts or surveyors, the rye could not be forwarded to its destination. This notice the defendants refused to accept; and on the 5th of March the defendants, as insurers, summoned the captain before the Tribunal of Commerce for the purpose of having it decreed that there was no occasion to sell the residue of the rye.—The Court

FOREIGN JUDGMENT—*continued.*
accordingly ordered the residue of the rye to be surveyed, and the surveyors reported that it could be re-shipped and conveyed to its destination. This report was confirmed by the Court, and notice of it given to the assured, together with notice that any course pursued with the cargo would be for their account and on their responsibility. The rye, however, was not forwarded, and remained until December warehoused at La Rochelle, although the captain might have procured a ship to carry it on. The captain having in the meantime procured advances to meet the expenses caused by the interruption of the voyage, was summoned, by the parties who had made the advances, before the Tribunal of Commerce; and on the 14th of September the Court decreed a sale of the ship, and a statement of general and particular average of the ship and cargo to be drawn up, which was accordingly done. On the 21st of December the Tribunal of Commerce decreed the sale of the rest of the cargo, on the ground that the weather was unfavourable for its preservation. On the 25th of January the Tribunal of Commerce decreed that the full amount of the freight due upon the whole voyage was chargeable upon the proceeds of such sale; and an amended average statement, which proceeded on this footing, was confirmed by the Court. If the proportion of freight so payable was to be added to the extra expenses incurred in respect of the residue of the cargo so sold by reason of the interruption of the voyage, including the extra freight in respect of forwarding to the port of destination, the amount would exceed the value of the rye at the port of destination. It was admitted that neither the law of France or Austria was in accordance with the decree of the 25th of January, and if the proper proportion of freight had been charged to the residue of cargo sold, the value at the port of destination would have exceeded the expenses:—*Held*, that there was no constructive total loss of the cargo; inasmuch as the decree for the sale of the residue of the cargo was not due to the perils insured against, but was made for the purpose of paying advances incurred through the captain's breach of duty in not forwarding such rye to its destination; and the insurers were not concluded by the judgment of the French Court from denying that there was no total loss, because it was admitted that such judgment was erroneous according to the law which it professed to administer. Meyer *v.* Ralli 358

FORFEITURE—Breach of covenant—Notice of assignment - - - - 106
See Covenant to repair. 2.

—— Non-repair—Suspension of notice C. A. 120
See Covenant to repair. 3.

FRANCHISE.
See Cases collected under Vote for Parliament.

FRAUD ON CREDITORS—*Illegal Agreement—Assignment of Debtor's Estate for the Benefit of Creditors—Bankruptcy.*] Declaration for breach of agreement, whereby, in consideration that the plaintiff would assign all his estate to the defendants, two of his creditors, as trustees for the equal benefit of all his creditors, and would disclose to the defendants all his estate, the defendants

FRAUD ON CREDITORS—*continued.*
promised, upon the realization of his estate, to return and pay to the plaintiff 50*l.*:—*Held*, on motion in arrest of judgment, that the declaration was bad, inasmuch as the agreement therein set forth, being made without the consent of the creditors, was illegal as a fraud on their rights. Blacklock *v.* Dobie - - - - 265

FRAUDS, STATUTE OF—*Sale of Timber—Interest in Land—Actual Receipt of Part of Goods sold—Statute of Frauds, ss.* 4, 17.] A sale of growing timber, to be taken away as soon as possible by the purchaser, is not a contract or sale of land, or any interest therein, within the 4th section of the Statute of Frauds.—The defendant by word of mouth purchased certain growing trees for 26*l.* of the plaintiff on the terms that he, the defendant, should remove them as soon as possible. The defendant accordingly cut down some of the trees and agreed to sell the tops and stumps to a third person. The plaintiff then countermanded the sale, and prohibited the defendant from cutting down the rest of the trees. The defendant, however, cut down the remainder, and carried the whole away:—*Held*, that the case was within the 17th section of the Statute of Frauds, and that before the sale was countermanded there was an acceptance and actual receipt of part of the goods sold within that section. Marshall *v.* Green - - 35

2. —— *Sale of Goods—Alteration of Contract, or Arrangement as to Time or Mode of performing it, made by Parol—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 17.] On the 15th of June, 1874, the defendant bought of the plaintiffs 100 tons of pig-iron, to be delivered, "25 tons at once, and 75 tons in July next." By the end of July 75 tons in all had been delivered. There was no evidence of any request by the defendant to the plaintiffs before the end of July to delay the delivery of the last 25 tons; but it was proved that in October the defendant verbally requested the plaintiffs' manager to deliver them, in consequence of which they were forwarded in the course of the same month to the defendant, but he declined to receive them.—In an action against the defendant for refusing to accept the 25 tons, the defendant pleaded, amongst other pleas, that the plaintiffs were not ready and willing to deliver the iron according to the contract:—*Held*, that, inasmuch as the vendors were not shewn to have withheld the delivery of the 25 tons in consequence of a request by the vendee before the expiration of the agreed time, viz. in July, the action was not maintainable upon the original contract; and that the subsequent conversation with the vendors' manager could not be relied upon either as a new contract or as an arrangement for an altered time of delivery. Plevins *v.* Downing [220

3. —— *Contract of Sale*—29 *Car.* 2, *c.* 3, *s.* 17—*Signature to Contract in Broker's Book.*] A broker, acting for the plaintiff, made a contract for the sale of goods to the defendant, sending a note to each party, but signing only that which was sent to the seller; he, however, entered the contract in his book in which he signed both the bought and the sold-note. The defendant kept the note which was sent to him without objection

FRAUDS, STATUTE OF—*continued.*
until called upon to accept the goods, when he repudiated the contract, assigning for reason that the note sent to him was not signed:—*Held*, that the conduct of the defendant amounted to an admission that the broker had authority to make the contract for him, and consequently that his signature to the sold-note bound the defendant.—*Held*, also, that the signed entry in the broker's book was a sufficient memorandum of the bargain to satisfy the Statute of Frauds. THOMPSON *v.* GARDINER - - - - - 777

FREIGHT—Pro ratâ - - - - 137
See FREIGHT PRO RATÂ ITINERIS.

FREIGHT PRO RATÂ ITINERIS—*Charterparty—Cargo sold at Intermediate Port to raise Money for Repairs of Ship.*] Freight was payable by the terms of a charterparty upon delivery of cargo at the port of destination. The ship meeting with sea damage from heavy weather, the captain at an intermediate port justifiably sold part of the cargo shipped by the charterer, to raise funds for the necessary repairs. The cargo so sold fetched more than it would have done if carried to the port of destination. The ship, having completed her repairs, proceeded to the port of destination with the remainder of the cargo. A general average statement was afterwards made up, under which the charterer received from the shipowner the amount realized by the cargo sold at the intermediate port. The shipowner claimed from the charterer freight pro ratâ itineris on the cargo so sold:—*Held*, that he was not entitled to such freight. HOPPER *v.* BURNESS - - 137

FULL AND COMPLETE CARGO—*Charterparty, Construction of—Contract to load "full and complete Cargo, say about 1100 Tons."*] A charterparty provided that the ship should proceed to the port of loading and there load "a full and complete cargo of iron ore, say about 1100 tons." The charterer provided a cargo of 1080 tons, the actual capacity of the ship being 1210 tons:—*Held*, that the words, "say about 1100 tons," were not mere words of expectation, but words of contract, and that the charterer's undertaking was not to load the ship up to her actual capacity; but that 3 per cent. was a fair amount of excess over 1100 tons to allow in estimating what was a full and complete cargo of about 1100 tons, and consequently the cargo actually provided fell short of the charterer's obligation by 53 tons. MORRIS *v.* LEVISON - - - - 155

GAMING—*Wager—Contribution towards Prize to be awarded to Winner*—8 & 9 *Vict. c.* 109, *s.* 18.] H. and B. deposited 50*l.* each with N., and entered into a written agreement that the 100*l.* should be paid to H. if his horse trotted eighteen miles in an hour, and if not, then to B. The referee decided that the horse did trot the distance within the hour. B. demanded his 50*l.* back from N. before the money had been paid over to H.:—*Held* (affirming the decision of the Common Pleas Division, that B. was entitled to recover his stake back from N., for that the transaction was simply a wager, and did not come within the proviso in 8 & 9 Vict. c. 109, s. 18, as to contributions to a prize, or sum of money to be awarded to the winner

GAMING—*continued.*
of any lawful game, sport, pastime, or exercise. BATSON *v.* NEWMAN - - - **C. A. 573**

GROWING CROPS—*Bill of Sale, what amounts to—Bills of Sale Act*, 17 & 18 *Vict. c.* 36, *ss.* 1, 7—"*Capable of complete Transfer by Delivery.*"] Growing crops are not personal chattels within the Bills of Sale Act.—A contract in writing for the sale of personal chattels, if the property passes by the contract, is a transfer or assurance of personal chattels within the Bills of Sale Act. BRANTOM *v.* GRIFFITS - - - 349

HABENDUM—*Lease—Discrepancy, as to Duration of Term, between Habendum and Reddendum, and between Lease and Counterpart—Reformation of Deed.*] Where there is an irreconcilable discrepancy between a lease and its counterpart, the former must be taken to be correct rather than the latter.—Where the statement of the duration of the term in the habendum differs from that in the reddendum, the statement of the term in the latter will be treated as surplusage, and the former must prevail.—In 1784, a lease was granted, habendum for 94¼ years, reddendum for 91½ years. The counterpart in both places had it 91½ years; and there were circumstances (not strictly evidence) which tended to shew that the term really intended to be granted was 91½ years only. In ejectment by the assignee of the reversion against the assignee of the lessee, brought in 1876:—*Held*, that, the lease being the superior part of the instrument (treating the lease and counterpart as one deed), the statement in the habendum thereof must prevail; and that, as between the parties to the action, there could be no reformation. BURCHELL *v.* CLARK - - - **602**

HIGHWAY—*Access becoming impossible.*] A way ceases to be a "public highway" where the access to it at either end has become impossible by reason of ways leading to it having been legally stopped up. BAILEY *v.* JAMIESON - - **329**

HOUSE OF LORDS APPEAL—*Practice—Appeal to House of Lords—Staying Execution pending Appeal—Bail in Error—Extending Time—Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *ss.* 2, 21—*Rules of Supreme Court, Order LVIII., Rules* 1, 16—*Common Law Procedure Act*, 1852, *ss.* 151, 155.] The practice with regard to appeals to the House of Lords is unaltered by the Judicature Acts and Rules.—Therefore, on an appeal from a decision of the Court of Appeal in an action attached to one of the Common Law Divisions of the High Court, the appellant cannot obtain a stay of execution of the judgment pending the appeal, unless he gives bail in error, as provided by the Common Law Procedure Act, 1852, s. 151; and on doing that he is entitled to a stay of execution as a matter of right.—An application to enlarge the time for giving bail in error must be made, not to the Court of Appeal, but to that Division of the High Court to which the action is attached. JUSTICE *v.* THE MERSEY STEEL AND IRON COMPANY [**C. A. 575**

ILLEGAL AGREEMENT—Simony - **C. A. 638**
See SIMONY.

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ILLEGALITY—Simony - - C. A. 638
See Simony.
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MORTGAGE OF SHIP—*Effect of Non-registration—Merchant Shipping Act*, 1854, 17 & 18 *Vict. c.* 104.] Under s. 69 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), the only effect of the omission to register a mortgage of a ship is, to postpone the mortgagee's claim to that of a subsequent mortgagee or transferee whose mortgage or transfer is registered before it. Therefore the non-registration of the mortgage affords no answer to the claim of the first mortgagee to freight earned by the ship as against a purchaser of the cargo without notice of the mortgagee's title.—The mere omission by a person to do something which it is not his duty to do, but which if done would have prevented loss to another, is not sufficient to render such person liable for such loss, or to deprive him of any right which he would otherwise have had against the other.—An unregistered mortgage of a ship passes to the mortgagee the ownership of the ship, as against a subsequent equitable assignment of the freight to a third person,—at all events, in the absence of fraud or such gross and wilful negligence as is equivalent to fraud.—On the 1st of December, 1874, M., the owner of 60/64ths of the ship *Stonehouse*, then at San Francisco (the captain being owner of the residue), mortgaged his interest to the plaintiffs for 7500*l.* and further advances. Freights not being obtainable at San Francisco, the captain on the 2nd of December procured a shipment of wheat there "on account of the ship," which cargo was consigned to the orders of the shippers, under bills of lading stating the freight payable on delivery to be 1*s.* per ton, and they (the shippers) drew bills on M. for the price at sixty days' sight, which were attached to the bills of lading. The ordinary freight at this time was

MORTGAGE OF SHIP—*continued.*

55*s.* per ton. On the 4th of January, 1875, the defendants advanced M. 3000*l.*, and on the 22nd of February a further sum of 9000*l.*, on the security of the cargo, without notice of the plaintiffs' mortgage,—it being arranged that they should sell the cargo and receive the proceeds on M.'s account. Before carrying out this arrangement with M., the defendants searched the ship's register, and found no registered incumbrance of his interest therein. On the 2nd of February, 1875, there was a further mortgage of the ship by M. to the plaintiffs for 4000*l.* and further advances. On the 26th of February, M. assigned to the defendants the freight of the *Stonehouse* at 55*s.* per ton; and on the 2nd of March M. further mortgaged his interest in the ship to one H., who registered his mortgage on the 3rd of March. The plaintiffs' mortgages were not registered until the 6th of March.—The *Stonehouse* arrived at Liverpool on the 13th of April, when H. and the plaintiffs took possession of her. H., being satisfied with his security on the ship, did not claim the freight. —On the 19th of February, 1875, the defendants and M. sold the cargo to J. & Co. on the terms of freight being paid at 55*s.* per ton; and by subsequent arrangement the defendants acquired the rights of J. & Co.:—*Held*, that H., the first registered mortgagee, having abandoned all claim to the freight, the plaintiffs as second mortgagees were entitled to claim it as against the defendants. Keith *v.* Burrows - - - 722

MUNICIPAL ELECTION—Nomination paper [596, 670

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NEGLIGENCE—Fellow servant - 161, 556

See Negligence of Servant. 1, 2.

—— Loss of security - - - 578

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—— Railway company—Defective truck C. A. 342

See Evidence of Negligence.

—— Sub-contractor - - - C. A. 482

See Negligence of Servant. 3.

NEGLIGENCE OF SERVANT—*Master and Servant —Liability of Master for Negligence of Servant—Exception as to Fellow-servant or Fellow-workman.*] The principle which exempts a master from liability to his servant for injury caused by the negligent act of a fellow-servant or fellow-workman, is, that the servant must be assumed to have contemplated and tacitly assented to encounter the ordinary risks incident to the service or employment, at the time of entering into the contract. — The plaintiff (who was a licensed waterman and lighterman) was in the employ at weekly wages of the defendant, a corn-merchant and warehousekeeper; his ordinary duty being to attend at the waterside of the premises every tide for about an hour and a half before and after high-water, for the purpose of bringing barges to and from the wharf and there mooring and unmooring them. It was no part of his duty to load or unload the barges or to assist in any way in the work of the warehouse: but it was his habit to go to the office on the land side of the warehouse for orders, or when sent for by the defendant's manager. There were two ways of going there, viz. by landing from his boat at stairs at the end of the street next adjoining the warehouse, or by stepping from the barges into and going through the warehouse and out by a door to the street. He usually went by this latter way. Being on the barges at a time when his actual duty did not require him to be there, he was sent for to the office, and was proceeding thither by his accustomed route, when, in passing out from the warehouse door to the street, he was knocked down and injured by a sack of grain which another of the defendant's men was in a negligent manner hoisting by means of a crane from a waggon:—*Held*, that this was an injury caused by the negligence of a fellow-workman, within the abovementioned exception, and consequently that the master was not liable. Lovell *v.* Howell 161

2. —— *Master and Servant—Liability of Employer for Negligence of a Fellow-workman—Common Employment—Practice—Costs of Appeal.*] The defendants, who were colliery owners, commenced sinking a shaft, for which purpose they employed workmen (amongst whom was the plaintiff) and a steam-engine with a man to drive it. Having proceeded some depth, the defendants contracted with one W. to complete the work. Under this contract W. was to employ and pay the workmen (including the plaintiff), and the defendants were to provide steam power and to pay the engineer's wages; the engineer, however, to be under the orders and control of W.—Through the negligence of the engineer, the plaintiff sustained an injury whilst at work at the bottom of the shaft:—*Held*, that, inasmuch as the plaintiff and the engineer were engaged in one common employment under the orders and control of W., the contractor, the defendants were not responsible for the engineer's negligence, notwithstanding that his wages were paid by them.—The Court of Appeal refused to require an insolvent appellant to give security for the costs of the appeal, where the question at issue had not been previously considered in a Court of error. Rourke *v.* White Moss Colliery Company - - - 556

3. —— *Master and Servant—Sub-contractor—Conversion—Privity of Contract.*] By agreement between the Smithfield Club and the defendants, who were proprietors of a building and premises at Islington called the Agricultural Hall, the club were to have the exclusive use of the Hall during the period of their annual show of stock, &c., the defendants providing and paying a sufficient staff (who were to be under the sole control of the secretary and stewards of the club), to receive, take care of, and re-deliver the stock, &c., exhibited, and also paying the club 1000*l.*; in consideration of which the defendants were to receive certain fees or admission money from the visitors. The stock and articles to be exhibited were received at the gate of the defendants' premises by one Sharman (upon orders signed by the secretary of the Smithfield Club), who contracted with the defendants for a lump sum, amongst other things, to receive them and to re-deliver them at the end of the show upon like orders; the defendants in no way interfering. One Stilgoe, who exhibited a pen of three sheep at the show in 1873, sold them to the plaintiff; and upon the plaintiff's drover producing an order for

NEGLIGENCE OF SERVANT—*continued.*
their removal signed by Stilgoe, Sharman or one of his men delivered him by mistake sheep from another pen. These the plaintiff rejected, and he brought this action against the defendants for converting his sheep:—*Held*, by Grove and Archibald, JJ.,—Lord Coleridge, C.J., doubting,—that the defendants were not responsible under the circumstances for the acts or defaults of Sharman or his men.—Affirmed on appeal,—the Court of Appeal holding that, as between the plaintiff and the defendants, there was no privity of contract, and no duty on the part of the latter to re-deliver the stock, &c., at the close of the show. Goslin *v.* Agricultural Hall Company (Limited) C. A. 482

NEXT OF KIN—Administration—Notice 246
See Notice to Creditors.

NOMINATION PAPER—Municipal election [596, 670
See Election of Town Councillor. 1, 2, 3.

NOTICE OF WANT OF REPAIR—Covenant 77
See Covenant to repair. 1.

NOTICE TO CREDITORS—*Executors and Administrators—Notice to Creditors and Others to make their Claims, under 22 & 23 Vict. c. 35, s. 29—Sufficiency of Publication—Next of Kin.*] Sect. 29 of 22 & 23 Vict. c. 35 is not confined to claims of *creditors* of the testator or intestate, but applies also to persons having claims as *next of kin*.—It also affords protection to the sureties in an administration bond, where the administrator, before distributing the assets of the intestate, has pursued the course pointed out by that section.—A notice addressed to "creditors and other persons having claims or demands against or upon the estate of the intestate," requiring them to send in particulars of their claims or demands upon the estate to the administrator, or that, in default thereof, he will, at the expiration of the time mentioned in the notice, proceed to administer the assets of the deceased, having regard only to the claims and demands of which he should then have had notice:—*Held*, a sufficient notice under the statute to a person having a claim as *next of kin*.—A., the daughter of the intestate, left her home at an early age (in 1857), changed her name, and, without notice to any of her relatives, went to America. In 1871 she returned to England and endeavoured to find her mother; but, the mother having changed her residence and married again, she was unable to find her. She again came to England in 1874, when she found that her mother was dead. In the meantime a sister of her mother had obtained letters of administration, and, after advertising in the *London Gazette* and in the *Times* and another London newspaper, in the terms of s. 29 of 22 & 23 Vict. c. 35, for "creditors and other persons having claims or demands against or upon the estate of the deceased," distributed the assets amongst the brother and two sisters (herself being one) of the deceased, being ignorant that the daughter, A., was still living.—In an action by A. (who had procured the revocation of the letters of administration granted to her aunt, and a fresh grant to herself, and an assignment of the administration bond) against the sureties:—*Held*, that,

NOTICE TO CREDITORS—*continued.*
the notice being good in form, and the publication all that could reasonably be required under the circumstances, the 29th section of 22 & 23 Vict. c. 35 afforded a good defence. Newton *v.* Sherry [246

NOTICE TO REPAIR—Suspension C. A. 120
See Covenant to repair. 3.

OCCUPATION—Poor-rate—Moorings C. A. 54
See Assessment to Poor-rate.

PARLIAMENT.
See Cases collected under Vote for Parliament.
—— Election petition - - - 410
See Election Petition.

PARTICULAR CHARGES—Suing and enforcing clause - - - - 358
See Foreign Judgment.

PENALTY—Delay—Building contract - 518
See Building Contract.

PETITION—Election—Amendment - 410
See Election Petition.

POOR-RATE—Assessment—Moorings C. A. 54
See Assessment to Poor-rate.

PRACTICE—Appeal—Judge of Divisional Court [C.A. 259
See Divisional Court.
—— Appeal—Security for costs - - 556
See Negligence of Servant. 2.
—— Arbitration—Stating case 380, C. A. 402
See Compensation under Lands Clauses Act. 1.
—— Attachment—Service - - - 58
See Waiver of personal Service.
—— Counter-claim - - - - 145
See Counter-claim.
—— County Court appeal—Case - - 70
See County Court Appeal.
—— House of Lords appeal - - C. A. 575
See House of Lords Appeal.
—— Judgment of Superior Court - - 227
See Removal of Judgment.
—— Security for costs—Appeal - - 556
See Negligence of Servant. 2.
—— Security for costs—Appeal - C. A. 143
See Security for Costs.
—— Substituted Service - - C. A. 563
See Substituted Service.
—— Venue—Action for rent-charge C. A. 51
See Action for Rent-charge.
—— Winding-up—Staying action - - 45
See Staying Proceedings.
—— Writ—Bills of Exchange Act - 334
See Writ under Bills of Exchange Act.
—— Special indorsement - - - 719
See Writ specially indorsed.

PREVIOUS CONVICTION — *Assault — Summary Conviction a Bar to Action—Action by Husband for assaulting Wife—24 & 25 Vict. c. 100, s. 45—"Same Cause."*] The defendant assaulted the female plaintiff, and for such assault was fined by the justices under 24 & 25 Vict. c. 100, and paid the fine:—*Held*, that an action by the husband in

PREVIOUS CONVICTION—*continued.*
respect of the consequential damage to himself by reason of the assault on his wife was barred under the 45th section of the Act. MASPER AND WIFE *v.* BROWN - - - - - - 97

PRINCIPAL AND AGENT—Cheque—Indorsement - - - - C. A. 548
See CHEQUE.

—— Commission - - - - - 505
See COMMISSION OF AGENT.

—— Contract—Liability of agent C. A. 100, 374, 1, 2. [533
See CONTRACT BY AGENT.

—— Ratification - - - C. A. 374
See CONTRACT BY AGENT.

—— Ship—Managing owner - C. A. 745
See SHIP'S HUSBAND.

PRINCIPAL AND SURETY—Giving time 707
See DISCHARGE OF SURETY.

PRIVILEGED COMMUNICATION—*Defamation—Slander—Privilege of Witness.*] The defendant, an expert in handwriting, had given evidence in the Court of Probate on the trial of a case called *D.* v. *M.*, in which the genuineness of the signature of the testator to a will was in issue, and had pronounced it as his opinion that the signature was a forgery. The jury found in favour of the will, and the judge of the Court of Probate made some strong observations of an unfavourable nature with regard to the defendant's evidence. —The defendant was afterwards a witness for the defence at a preliminary inquiry before a magistrate into a charge of forgery. The counsel for the prosecution asked him, in cross-examination, whether he had read the remarks made, as above mentioned, by the judge of the Court of Probate, and upon the defendant answering that he had, sat down. The defendant then said he wished to make a statement about the case of *D.* v. *M.* The magistrate said that he could not hear anything about a case not then before the Court, and tried to stop him, but the defendant persisted, and said, "I believe that will to be a rank forgery, and shall believe so to the day of my death."—In respect of the words so spoken the plaintiff, who was an attesting witness to the will, brought an action of slander:—*Held*, that the statement was privileged, and the action would not lie, although the jury found that the words were not spoken by the defendant in good faith as a witness, that he spoke them as a volunteer and for his own purposes, and that he spoke them maliciously, and the Court were of opinion that there was evidence to justify these findings. SEAMAN *v.* NETHERCLIFT [540

—— Inspection - - - - - 471
See PRODUCTION OF DOCUMENTS.

PRIVILEGED PUBLICATION — *Privilege by Reason of the Occasion—Comments on Matters of public Interest.*] To justify the publication in a newspaper of defamatory comments,—apart from reports of what passes in Courts of Justice,—it must be shewn either that the person of whom the defamatory matter is written was a person whose position and character are of general interest to the whole country, or that the subject-matter dealt with is one of general interest to the whole community. It is not enough to shew that the individual fills a public character of a limited

PRIVILEGED PUBLICATION—*continued.*
kind and in a limited district, or that the subject-matter dealt with is of interest only to a small portion of the public, or to the public in a limited district.—The defendants, the proprietors of a newspaper, published a report of the proceedings at a meeting of the board of guardians of a provincial union, containing false and defamatory matter reflecting upon the medical officer of the union workhouse:—*Held*, not privileged by the occasion, though the report was admitted to be bonâ fide and a correct account of what passed at the meeting. PURCELL *v.* SOWLER - - 781

PRODUCTION OF DOCUMENTS — *Inspection — Privileged Communications—Letters written with a View to anticipated Litigation.*] The mere fact that letters are written to the plaintiff's solicitor "in confidence" and under a pledge not to disclose their contents to any one but the plaintiff and his legal advisers, affords no defence to an application for an order to inspect them. But, if they are not merely confidential communications, but are written in answer to inquiries by the plaintiff's solicitor with a view to and in contemplation of anticipated litigation, they are privileged.—*Cossey* v. *London, Brighton, and South Coast Ry. Co.* (Law Rep. 5 C. P. 146) and *Skinner* v. *Great Northern Ry. Co.* (Law Rep. 9 Ex. 298) followed.—*Fenner* v. *London and South Eastern Ry. Co.* (Law Rep. 7 Q. B. 767) observed upon and explained. M'CORQUODALE *v.* BELL - 471

PROHIBITION—*Lord Mayor's Court—Demand under 50l. — Defendant carrying on Business within Jurisdiction — Mayor's Court Procedure Act*, 1857 (20 & 21 *Vict. c. clvii.*), *ss.* 12, 15.] The effect of the 12th and 15th sections of the Mayor's Court Procedure Act, 1857, is to extend the jurisdiction of the Mayor's Court in cases within the 12th section, and consequently a prohibition cannot be granted to prohibit an action in the Mayor's Court for a sum of less than 50*l.*, the defendant carrying on business, and part of the cause of action having arisen, within the City.—*Mayor of London* v. *Cox* (Law Rep. 2 H. L. 239) distinguished. HAWES *v.* PAVELEY C. A. 418

2. —— *Mayor's Court of London Procedure Act*, 1857 (20 & 21 *Vict. c. clvii., s.* 48—*Setting aside a Judgment removed into a Superior Court—Want of Jurisdiction — Motion by Defendant.*] Sect. 48 of the Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), enacts that a judgment removed from that court to a superior Court shall have the same force and effect as a judgment recovered in the superior Court:—*Held*, that it is competent to the Court to which such judgment is so removed to set it aside, if satisfied it was obtained in a matter over which the inferior court had no jurisdiction.—A prohibition may be moved for by the defendant himself, where the Court is satisfied that the inferior court is proceeding without jurisdiction.—*Baker* v. *Clark* (Law Rep. 8 C. P. 121) explained. BRIDGE *v.* BRANCH - - - - - 633

3. —— *Mayor's Court, London—Abandonment of severable Items—Discretion of the Superior Courts.*] An action having been brought in the Mayor's Court, London, upon a guarantee given by the defendants for an attorney's bill, upon shewing cause against a rule for a prohibition ob-

PROHIBITION—*continued.*
tained (before declaration) on the ground that the whole of the plaintiff's cause of action did not arise within the city of London, certain of the charges in the bill being for attendances at Westminster, the plaintiff consenting altogether to abandon his claim in respect of those items,—The Court discharged the rule, but without costs. Ellis *v.* Fleming - - - - 237

PROPERTY IN GOODS—*Sale of Goods—Passing of Property—Bill of Lading deliverable to Order of Vendor—Default of Purchaser—Jus disponendi.*] Where an unpaid vendor shipping goods under a contract of sale takes a bill of lading making the goods deliverable to his order, and retains such bill of lading in his own or his agent's hands for his own protection, he does not reserve the vendor's lien only, in case of the purchaser's making default in payment of the price, but reserves a right of disposing of the goods so long at least as the purchaser continues in default. Ogg *v.* Shuter - - C. A. 47

PUBLIC INTEREST—Libel—Privilege - 78
See Privileged Publication.

RAILWAY COMPANY—Negligence—Defective truck - - - - C. A. 342
See Evidence of Negligence.

—— Shareholder - - - - 201
See Shareholder.

—— Ticket—Condition - - - 618
See Condition on Ticket.

—— Unpunctuality—Damages - C. A. 286
See Unpunctuality of Train.

RATIFICATION—Policy of insurance C. A. 374
See Contract by Agent.

RATIFICATION BY INFANT—*Infant—Ratification of Promise after attaining full Age*—9 *Geo.* 4, *c.* 14, *s.* 5.] A recognition when of full age of a debt contracted in infancy, and a promise to pay it "as a debt of honor" when of ability, is not such "a ratification of the contract made during infancy" as is required by 9 Geo. 4, c. 14, s. 5, to charge the party. Maccord *v.* Osborne - 568

REFERENCE TO MASTER—*Arbitration—Award—Supreme Court of Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66), *ss.* 56–58—*Supreme Court of Judicature Act* (38 *&* 39 *Vict. c.* 77), *Order XXXVI., Rules* 30–34.] The old law and practice with regard to references to arbitration are not abolished by the Judicature Act, and consequently where a cause is referred to an arbitrator for decision according to the old practice, the arbitrator cannot be called on to report to the Court with regard to the matter referred to him, but his decision is final.—An order was made that a cause should be referred to the master, and that the subsequent proceedings should be continued and concluded according to the new practice:—*Held*, that the reference was not merely for report by the master under the new powers given by the Judicature Act, but for decision, and that the master could not be made to report to the Court, but his decision was final. Cruikshank *v.* The Floating Swimming Baths Company - - - 260

REGISTRATION—Mortgage of ship - 722
See Mortgage of Ship.

REMOTENESS OF DAMAGE—*Breach of Warranty on the Sale of a Cow—Foot and Mouth Disease—Measure of Damages.*] The defendant sold a cow to the plaintiff, a farmer, with a warranty that she was free from foot and mouth disease. The plaintiff placed the cow (which had the disease) with other cows, and some of these became infected with the disease, and died, as also did the cow in question:—*Held*, that the defendant was liable in damages for the entire loss, if when he sold the cow he knew that the plaintiff was a farmer, and that he would or probably might place the infected cow with others. Smith *v.* Green - - - - - 92

2. —— *Damages — Remoteness — Failure to transmit telegraphic Message—Message in Cipher.*] The defendant's business was to collect telegraphic messages for transmission to America and other places. The plaintiffs intrusted the defendant with a message in cipher, which was unintelligible to the defendant, for transmission to America. The defendant negligently omitted to send the message. The consequence was that the plaintiffs lost a sum of money which they would have earned for commission upon an order to which the message related:—*Held*, that the plaintiffs could not recover such sum of money from the defendant, but only nominal damages. Sanders *v.* Stuart - - - - 326

3. —— *Measure of Damages for Breach of Contract—Costs of consequent Litigation—Proximate Cause.*] The plaintiff contracted with a Tramways Company to construct a tramway for them in a public road, and made a sub-contract with the defendants (an asphalte company) under which the latter undertook to lay the asphalte and to keep it in good repair and condition for twelve months. In consequence of the defective state of the asphalte within that period, one H., who was driving along the road, was thrown out of his cart and injured. H. thereupon brought an action against the Tramway Company, who gave notice to the plaintiff. The plaintiff then called upon the defendants to defend H.'s action, but they declined to have anything to do with it. The plaintiff resisted H.'s claim, and ultimately compromised it for 70*l.*, but was obliged also to pay 40*l.* for the costs of H.'s attorney, and expended 18*l.* more for the costs of defending the action. The jury found that the course taken by the plaintiff in resisting and ultimately compromising H.'s action was a reasonable and proper one:—*Held*,—upon the authority of *Bazendale* v. *London, Chatham, and Dover Ry. Co.* (Law Rep. 10 Ex. 35),—that the defendants were liable for the 70*l.*, but not for the 40*l.* or the 18*l.*, these latter charges not being "the natural or necessary consequence" of their default, the contracts between the plaintiff and the Tramway Company and between the plaintiff and the defendants being separate and independent contracts. Fisher *v.* The Val de Travers Asphalte Company - - - - 511

REMOVAL OF JUDGMENT—*Practice—Removal of a Judgment from an inferior to a superior Court, under* 1 *&* 2 *Vict. c.* 110, *s.* 22.] Where a judgment is removed from an inferior to a superior Court under 1 & 2 Vict. c. 110, s. 22, for execution, the superior Court has no jurisdiction to inquire into the merits or into the regularity of the pro-

REMOVAL OF JUDGMENT—*continued.*
ceedings in the court below. Williams *v.* Bolland - - - - - - 227

RENT-CHARGE—Action—Venue - C. A. 51
See Action for Rent-charge.

—— Vote for Parliament - - 178, 192
See Vote for Parliament. 1, 2.

RULES OF SUPREME COURT, O. V., r. 1 334
See Writ under Bills of Exchange Act.

—— **O. IX., r. 2** - - - - C. A. 563
See Substituted Service.

—— **O. XIV., r. 3** - - - - 719
See Writ specially indorsed.

—— **O. XIX., r. 3** - - - - 145
See Counter-claim.

—— **O. XIX., r. 3** - - - - 496
See Set-off.

—— **O. XXXVI., rr. 30-34** - - - 260
See Reference to Master.

—— **O. LVIII. rr. 1—16** - - - C. A. 575
See House of Lords Appeal.

—— —— r. 10 - - - - - 70
See County Court Appeal.

—— —— r. 15 - - - C. A. 143
See Security for Costs.

SALE NOT FOR BEST PRICE—Distress - 280
See Sale of Distress.

SALE OF COW—Damages - - - 92
See Remoteness of Damage. 1.

SALE OF DISTRESS—*Landlord and Tenant—Distress—Sale of Goods distrained—Failing to sell for the best Price—Covenant to consume Hay, &c., on the demised Premises—Illegal Restriction on Sale—2 Wm. & M. c. 5, s. 2—56 Geo. 3, c. 50, s. 11.*] A lease of a farm contained a covenant by the tenant not to remove hay, unthreshed corn, &c., from the demised premises, but to use them for the improvement of the land.—The landlord having distrained hay and unthreshed corn for rent in arrear, sold the distress under a condition that the purchaser should consume the matters sold on the premises, and consequently the best price was not obtained in accordance with 2 Wm. & M. c. 5: —*Held*, that the landlord could not legally sell under such a condition.—The 56 Geo. 3, c. 50, s. 11, does not apply to a sale by a landlord of a distress. Hawkins *v.* Walrond - - 280

SALE OF GOODS—Bill of sale - - 349
See Growing Crops.

—— Broken—Liability - 100, C. A. 374
See Contract by Agent. 1.

—— Cause of action - - - 87
See Cause of Action. 1.

—— Delivery orders—Estoppel - - 445
See Estoppel by Contract.

—— Property passing - - - 47
See Property in Goods.

—— Statute of Frauds - - 35, 220
See Frauds, Statute of. 1, 2.

SALE OF LAND—Statute of Frauds - 35
See Frauds, Statute of. 1.

SEAWORTHINESS—Detention of ship - 452
See Unseaworthy Ship.

SECURITY—Loss by negligence - - 578
See Estoppel by Conduct.

SECURITY FOR COSTS—*Practice—Appeal—Time for making Application—Rules of Supreme Court—Order LVIII., Rule* 15.] After the costs incident to an appeal have been actually incurred by the respondent, and the time is fixed for the hearing of the appeal, it is too late to apply for an order that the appellant shall give security for costs. Grant *v.* The Banque Franco-Egyptienne - - - - - C. A. 143

—— Appeal - - - - - 556
See Negligence of Servant. 2.

SERVICE OF WRIT—Colonial government
See Substituted Service [C. A. 563

SET-OFF—*Administration Suit—Order for taking an Account of Debts and Liabilities affecting the personal estate of Intestate, under 23 & 24 Vict. c. 38, s. 14—Set-off—Counter-claim—Judicature Act, 1875, Order XIX., Rule* 3.] To an action by an administrator for the balance of the intestate's banking account at the time of his death, the defendants in their statement of defence sought to avail themselves, either by way of set-off or of counter-claim, of a debt due to them from the intestate as one of several makers of a promissory note for 1000*l.* which did not become due until after the intestate's death. Reply, that, before action, an order was made in an administration suit in the Chancery Division, to take an account of the debts and liabilities affecting the personal estate of the deceased, of which the defendants before action had notice; and that, under s. 14 of 23 & 24 Vict. c. 38, equity would restrain any proceedings on the note until the account had been taken. On demurrer to this reply:—*Held*,—upon the authority of *Rees* v. *Watts* (11 Ex. 410), that the claim in respect of the promissory note could not be relied on as a set-off; and that, in accordance with the practice in Equity, the defendants must under the circumstances be restrained from setting it up by way of counter-claim, and be left to prove for it in the administration suit. Newell *v.* The National Provincial Bank of England [496

SHAREHOLDER—*Railway Company—Sci. Fa.—Shareholder — Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), ss. 3, 8, 36.*] A railway Act enacted that certain named persons, of whom the defendant was one, and "all other persons and corporations who have already subscribed to, or shall hereafter become proprietors in the undertaking, shall be and are hereby united into a company for the purpose of making and maintaining the railway," &c. By the Act, the capital of the company was to be 600,000*l.*, divided into 10*l.* shares, and the qualification of a director was to be the possession in his own right of not less than thirty shares. The defendant and the other named persons and two persons to be nominated by them were to be the first directors of the company, and were to continue in office until the first ordinary meeting of the company. The Act further enacted that a certain agreement between the plaintiff and the promoters of the company, which was set out in the schedule to the Act, should be confirmed, and should bind the company. By this agreement a sum of 315*l.* became payable to the plaintiff by the company at a cer-

SHAREHOLDER—*continued.*
tain date. For this sum the plaintiff afterwards recovered judgment against the company.—No ordinary meeting of the company ever was held, nor any meeting of directors, nor any general meeting of shareholders. No register of shareholders ever was made, nor were any shares ever allotted.—The Companies Clauses Consolidation Act enacts, in s. 3, that the word "shareholder" shall mean "shareholder, proprietor, or member of the company"; and, in s. 8, that "every person who shall have subscribed the prescribed sum or upwards to the capital of the company, or shall have otherwise become entitled to a share in the company, and whose name shall have been entered on the register of shareholders hereinafter mentioned, shall be deemed a shareholder of the company":—*Held* (affirming the decision of the Court below), that the defendant and the other persons named as directors by the Act were each shareholders to the extent of thirty shares, notwithstanding that no register of shareholders had ever been created, and that the defendant was liable to be proceeded against by scire facias as a shareholder upon the judgment obtained by the plaintiff. Portal *v.* Emmens - 201, C.A. 664

SHIP—Charterparty—Cesser of liability - 737
See Cesser of Charterers' Liability.

—— Charterparty—Full and complete cargo 155
See Full and complete Cargo.

—— Freight pro ratâ - - - 137
See Freight pro ratâ itineris.

—— Lay-days—Commencement - - 654
See Demurrage.

—— Liability of owner—Common carrier C. A. [423
See Common Carrier.

—— Managing owner—Authority to sell C. A. 745
See Ship's Husband.

—— Mortgage—Registration - - 722
See Mortgage of Ship.

—— Unseaworthiness—Detention - - 452
See Unseaworthy Ship.

SHIPOWNER—Common carrier C. A. 19, 423
See Common Carrier.

SHIP'S HUSBAND—*Shipping—Authority of managing Owner—Liability of Co-owners—Commission on Sale of a Ship—Construction of Power of Attorney.*] D., the managing owner of a ship, through the plaintiffs, his agents at Constantinople, sold her to the Turkish Government, and received a bill upon the Oriental Bank in London for the amount of the purchase-money, which bill was duly paid. D. had no express authority at the time from the defendants (who were the owners of 23/64ths of the ship) to sell her, but the latter knew that a sale was contemplated; and, after the sale, they executed a power of attorney, reciting that they had agreed to sell the vessel to the Turkish Government, and had actually received the purchase-money, and impowering the plaintiffs to transfer their respective shares and to hand over the vessel to the purchasers. The defendants afterwards received from D. (or settled in account with him) the value of their respective shares:—*Held*, that the jury were warranted in finding that the defendants had authorized the sale of the ship by D., or had by their subsequent ratification so adopted his act as to render them jointly liable

SHIP'S HUSBAND—*continued.*
to the plaintiffs for the commission due to the latter on the sale.—*Held*, also, that the position of the defendants was not so altered by the fact of the plaintiffs having drawn upon D. a bill at three months' date for the amount of the commission, as to release the former from liability upon the dishonour of the bill. Keay *v.* Fenwick C. A. 745

SIMONY—*Ecclesiastical Dilapidations*—34 & 35 *Vict. c.* 43—*Agreement that neither Party, on an Exchange of Livings, shall pay Dilapidations—Simony.*] The plaintiff, incumbent of the rectory of A., and the defendant, the incumbent of the vicarage of B., with the assent of their respective patrons and diocesans, agreed to exchange their respective benefices, without any payment being made for dilapidations on either side:—*Held*, by the Common Pleas Division, upon the authority of *Goldham* v. *Edwards* (16 C. B. 437; 17 C. B. 141; 18 C. B. 389), that such an agreement was not necessarily simoniacal before the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), and that it was not so contrary to the policy of that Act as to become illegal and void since.—The plaintiff having sued the defendant for dilapidations, the defendant pleaded the above agreement, the plaintiff replied, on equitable grounds, that the defendant at the time of the agreement represented to the plaintiff that the repairs of B. would be merely nominal, or only equal to those of A., though he "knew or ought to have known" that the former would be greatly in excess of the latter, and that on the faith that such representation was true the plaintiff made the agreement:—*Held*, on demurrer, that the replication was bad, there being no suggestion of fraud or that the defendant knew of the inequality at the time of making the agreement.—Affirmed by the Court of Appeal. Wright *v.* Davies - - - C. A. 638

SLANDER—Privilege—Witness - - 540
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SOLICITOR—Lien for costs - - - 771
See Solicitor's Lien.

—— Service of rule for attachment - 68
See Waiver of Personal Service.

SOLICITOR'S LIEN—*Solicitor's Costs.*] The defendant, a solicitor, was employed by one H. (who was a director and promoter of a limited company then in liquidation), with the privity of three other persons, the holders as nominees of H. of certain shares in the company, to take proceedings in connection with the winding-up of the company. H. deposited with the defendant the certificates of the shares for the purpose of enabling him to carry out his instructions, and the defendant received from the liquidator of the company certain cheques in respect of the shares standing in the names of those persons. In the meantime H. transferred to the plaintiffs his interest in the shares, with notice of the lien and charge of the defendant thereon for his costs, and the defendant, acting upon the retainer of the plaintiffs, continued the proceedings, and ultimately received from the liquidator four several cheques payable to H. and the other three persons respectively. In an action to recover these cheques:—*Held*, that the defendant was entitled, as against the plaintiffs, to a lien upon them for his costs of all the proceedings

SOLICITOR'S LIEN—*continued.*
against the company in respect of the shares. The General Share Trust Company *v.* Chapman 771
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STAY OF EXECUTION—House of Lords Appeal
See House of Lords Appeal. [C. A. 575
STAYING PROCEEDINGS—*Practice — Winding-up Petition—Judicature Act, 1873, s. 24, subs. 5*] A petition for an order to wind up a company having been preferred to the Chancery Division before the Master of the Rolls, an application was made to the Common Pleas Division to stay proceedings in an action of ejectment pending in that Division against the company;—The Court refused the application, being of opinion that it might more conveniently be made to the Master of the Rolls. Kingchurch *v.* The People's Garden Company, Limited - - - - 45
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SUBSTITUTED SERVICE — *Practice — Substituted Service—Colonial Government—Corporation —Judicature Act, 1875, Order IX., Rule 2.*] Where effectual personal service of a writ could not be made on the persons named as defendants, the Court would not order substituted service to be made. A colonial government is not a corporation and cannot be effectually served with a writ. Sloman *v.* The Governor and Government of New Zealand - - - - C. A. 563
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TRUCK—Defect—Negligence - C. A. 342
See Evidence of Negligence.

UNPUNCTUALITY OF TRAIN—*Railway Company—Liability for Want of Punctuality—Measure of Damages—Special Train.*] The plaintiff took a ticket for Scarborough at the defendants' station at Liverpool. The journey from Liverpool to Scarborough is viâ Leeds and York. The defendants' train only goes to Leeds; and from Leeds to Scarborough the journey is over the lines and by the trains of other companies. The ticket referred to the conditions in the defendants' published time bills, of which the most material part was as follows: "The published train bills are only intended to fix the time at which passengers may be certain to obtain tickets for any journey from the various stations, it being understood that the trains shall not start before the appointed time. Every attention will be paid to ensure punctuality, so far as it is practicable; but the directors give notice that the company do not undertake that the trains shall start or arrive at the time specified in the bills, nor will they be accountable for any loss, inconvenience, or injury which may arise from delays or detention. . . . The granting of tickets to passengers to places off the company's line is an arrangement made for the convenience of the public; but the company do not hold themselves responsible for any delay, detention, or other loss or injury whatsoever arising off their lines, or from the acts or defaults of other parties, nor for the correctness of the times over lines of other companies, nor for the arrival of this company's own trains in time for the nominally corresponding train of any other company or party."—The train by which the plaintiff travelled was too late at Leeds to catch the train by which the plaintiff should have proceeded to York; and when the plaintiff did arrive at York, at about 7 p.m., he found that the train for Scarborough which he should have caught had gone, and that the next train for Scarborough did not start till 8 p.m., arriving at about 10 p.m. He thereupon took a special train from the North Eastern Company which arrived at Scarborough between 8.30 and 9 p.m. The plaintiff had no business or engagement in Scarborough necessitating his being there at any particular time.—The plaintiff brought an action against the defendants in the county court, and the county court judge held that there was a contract on the defendants' part to use due diligence to insure punctuality, and that, upon the facts, there had not been such diligence used. He also held that the plaintiff was entitled to recover the cost of the special train on the authority of the dictum of Alderson, B., in *Hamlin* v. *Great Northern Ry. Co.* (26 L. J. (Ex.) 22), that "where one party to a contract does not perform it, the other may do so for him as near as may be, and charge him for the expense incurred in so doing."—On appeal to the Court of Common Pleas, that Court affirmed the judgment of the county court judge. On appeal from that decision to the High Court of Appeal:—*Held* (reversing the decision of the Common Pleas), that the county court judge was wrong in acting on the dictum above mentioned as an absolute rule. The principle is, that if one party does not perform his contract, the other may do so for him as reasonably near as may be, and charge him for the reasonable expense incurred in so doing; and a proper test of what is reasonable in such a case as the plaintiff's is to consider whether, according to the ordinary habits of society, a person delayed on his journey, under circumstances for which the company were not responsible, would have incurred the expenditure in question on his own account:—*Held*, also, by the majority of the Court (James and Mellish, L.J., Baggallay, J.A., and Mellor, J.), that the words "Every attention will be paid to insure punctuality as far as practicable" did import a contract to use due attention to keep the times specified in the time bills as far as practicable, having regard to the necessary exigencies of the traffic and circumstances over which the company had no control.—Per Cleasby, B. The effect of the conditions was that the company declined to enter into any contract as to the times specified in the time bills, whether absolute or qualified.—Per Baggallay, J.A. The contract in the conditions was such as to protect the defendants from any further liability in a case where they issued a through ticket than they would have incurred if they had only issued a ticket to the farthest point of the journey on their own system.—Per James, L.J. The true meaning of the contract was, that the persons in the management of the train would, with regard to the particular train on that particular journey, use due attention to ensure punctuality, but that the defendants were not to be held responsible for delays arising from circumstances unconnected with the management of the particular train. Le Blanche *v.* The London and North Western Railway Company C. A. 286

UNSEAWORTHY SHIP—*Merchant Shipping Act*, 1873 (36 & 37 *Vict. c.* 85), *ss.* 12, 13, 14, *Construction of—Detention of Ship for Unseaworthiness—Form of Order—Appeal.*] By s. 12 of the Merchant Shipping Act, 1873 (36 & 37 Vict. c. 85), it is enacted that, where the Board of Trade have received a complaint or have reason to believe that any British ship is by reason of the defective condition of her hull, &c., or by reason of overloading, &c., *unfit to proceed to sea without serious danger to human life*, they may appoint some competent person or persons to survey her and to report to them, and may if they think fit order her to be detained for survey; and thereupon any officer of Customs may detain such ship until her release be ordered either by the Board or by any Court to which an appeal is given under s. 14 of the Act; and, upon receipt of the report of the surveyor, the Board may, if in their opinion the ship cannot proceed to sea without serious danger to human life, make such further order as they may think requisite as to the detention of the ship, or as to her release either absolutely or upon the performance of such conditions with respect to repairs, &c., as the Board may impose;—*Held*, that neither the original information or complaint nor the report of the surveyor need state in terms that the vessel "cannot proceed to sea without serious danger to human life:" it is enough if the facts reported to the Board are such as ought reasonably to satisfy them that the condition of

UNSEAWORTHY SHIP—*continued.*

the ship is such that she is unfit to proceed to sea without serious danger to human life.—The chief officer of Customs at Hull, on the 6th of November, 1873, intimated to the Board of Trade that he had examined a ship called the *Mary Ann* (built in 1831), and was of opinion that she should be examined with the cargo out before being allowed to proceed to sea. The defendant (the assistant-secretary of the Board of Trade) on the 7th wrote to the collector of Customs at Hull, as follows:—"The Board of Trade having reason to believe that the vessel named above is unseaworthy, you are requested to detain her for the purpose of survey;" and on the same day he wrote to the owner of the *Mary Ann*, as follows,—"I am directed by the Board of Trade to inform you that they have reason to believe that the British ship *Mary Ann* is for the reasons stated unfit to proceed to sea without serious danger to human life. The Board of Trade have therefore ordered her detention by the proper authority until she can be surveyed." The ship was surveyed on the 12th of November by two surveyors of Customs, who reported to the Board that "they had examined the vessel, and found that a thorough repair would be required to render her seaworthy, that the decks were quite worn out, the deck-beams and knees were defective, and the timbers rotten," and intimated that, as the vessel belonged to Sunderland, the owner wished to take her there for repair. This report was sent to the owner of the *Mary Ann* on the 15th of November, inclosed in a letter, in which the assistant-secretary of the Board wrote, in answer to a request of the owner to be allowed to take the vessel to Sunderland in ballast,—"I am directed by the Board to state that they are prepared to allow the *Mary Ann* to be towed round to Sunderland for the necessary repairs, provided the crew, knowing the case, are willing to go in her. Upon hearing that the repairs indicated in the accompanying report have been effectually and completely carried out, they will direct a re-survey of the vessel to be made," &c. On the 1st of January, 1874, the Board communicated to the plaintiff's solicitors by telegram and letter their consent to the vessel *sailing* to Sunderland upon certain conditions. Those gentlemen in reply objected to the right of the Board to make the conditions indicated, "inasmuch as your surveyors did not report that the ship was 'unfit to proceed to sea'; neither has the Board of Trade, so far as we know, made any order stating that in their opinion the ship is unfit to proceed to sea."—In reply to this letter, the assistant secretary of the board wrote to the solicitors on the 7th of January, 1874, a statement of the facts relating to the detention of the *Mary Ann*, concluding as follows,—"The Board of Trade now withdraw the modification of their order by which she would have been allowed to proceed to Sunderland; and, under the powers given to them by the Act, they vary their order as follows, viz. that, as in their opinion the ship cannot proceed to sea without serious danger to human life, she shall be detained at Hull for further survey and repairs."—The ship was accordingly surveyed on the 14th of January, the surveyors reporting that every portion of the hull was in a state of extreme decay; concluding their report as follows,—"From what we have seen and tested, we are of opinion that at the time of survey the ship was, having regard to the nature of the service for which she was intended, unfit to proceed to sea without serious danger to human life." A copy of this report was sent to the plaintiff's solicitors on the 16th of January, in a letter in which the assistant-secretary wrote,—"I am to state that the order made by the Board thereupon is, that the vessel be detained at Hull until repaired to the satisfaction of this board's surveyor." Ultimately, the ship was taken possession of by a mortgagee, and sold for a small sum.—In an action brought by arrangement against the assistant-secretary of the Board of Trade for the alleged illegal detention of the ship:—*Held*, that the detention was justifiable, the Board having ample grounds for believing that the ship could not proceed to sea without serious danger to human life; that the letter of the 7th of November, 1873, did not amount to an order under s. 12 of the Act; but that the letter of the 7th of January, 1874, was a valid order which could be questioned only upon appeal under s. 14 of the Act.—Sect. 14 of the Act provides that, if the owner of any ship surveyed under this Act is dissatisfied with any order of the Board made upon such survey, he may apply (in England) to any Court having Admiralty jurisdiction; and such Court may order the ship to be surveyed anew, and may make such order as to detention or release of the ship, and as to costs and damages, as to the Court may seem just:—*Quære*, whether, in the case of any excess of jurisdiction on the part of the Board, the plaintiff's common-law remedy by action was taken away by this enactment? Lewis *v.* Gray [452

VALUATION—Insurance—Opening - C. A. 374
See Contract by Agent.

VENUE—Action for rent-charge - C. A. 51
See Action for Rent-charge.

VOTE FOR PARLIAMENT—*County Vote—Freehold Interest of uncertain Duration—Rent-charge—Power of Sale—Resulting Trust.*] By a deed made between three persons described as "trustees," of the one part, and thirty-four other persons described as "beneficiaries," of the other part, a rent-charge in fee of 120*l.* a year, of which the trustees had become possessed under a grant to them, was subdivided by them into fifty-four parts or shares, one of which was purchased and the price of 52*l.* 5*s.* paid by each of the thirty-four beneficiaries; and the trustees covenanted with them respectively to stand seised of an undivided equal fifty-fourth part of the rent of 120*l.* and the powers and remedies for enforcing payment thereof, and the benefit of the covenants contained in the original grant (all thereinafter referred to as "the said rent and premises"), in trust for each of the said beneficiaries, his heirs and assigns absolutely. The remaining twenty shares were retained by the trustees, in trust for themselves, their heirs and assigns, as tenants in common.—The deed also contained a covenant by each of the beneficiaries with the trustees that, if the former should be desirous of selling his share of the rent-charge, it should be first offered to the trustees at a price to be ascertained, in case of dispute, by two arbitra-

VOTE FOR PARLIAMENT—*continued.*

tors; and a similar covenant as to the shares of the trustees. Then came a declaration or proviso that the trustees, or the survivor of them, &c., should respectively have "an absolute power of sale over the said rent and premises, exerciseable at their or his discretion, without any further consent on the part of any person:"—*Held*, that the power of sale reserved to the trustees did not cut down the freehold interest which was created in the beneficiaries by the earlier part of the deed, inasmuch as it could only be exercised by the trustees for the benefit of the beneficiaries; and, consequently, that the latter had such a freehold interest as would entitle them to be registered as voters for the county. Ashworth *v.* Hopper 178

2. —— *County Vote—Rent-charge issuing out of two several Estates*—8 *Hen.* 6, *c.* 7—*Frank-tenement.*] A person possessed of two several rent-charges in fee issuing out of two several pieces of freehold land in the same county, neither of which rent-charges alone is of the yearly value of 40*s.*, but which together are of the clear yearly value of 40*s.*, has "free tenement" within stat. 8 Hen. 6, c. 7, and is entitled to a county vote. Wood *v.* Hopper - - - - - - 192

3. —— *County Vote—"Full Age"—Registration Act* (6 *Vict. c.* 18), *s.* 40—*Representation of the People Act*, 1867 (30 *&* 31 *Vict. c.* 102), *s.* 6.] To entitle a voter to be registered in respect of the 12*l.* occupation franchise under s. 6 of the Representation of the People Act, 1867, he must have been of full age on the last day of July in the qualifying year. Hargreaves *v.* Hopper 195

WAGER—Contribution towards prize C. A. 573
See Gaming.

WAIVER OF PERSONAL SERVICE—*Attorney—Attachment for Non-delivery of Bill—Waiver of personal Service of Rule—Practice.*] A rule for an attachment against a solicitor for non-delivery of a bill of costs pursuant to a judge's order stood in the peremptory paper for the 9th of November; but owing to pressure of business the rule could not be argued on that day, and by consent of counsel on both sides it was adjourned to a future day. The counsel for the solicitor not appearing at the adjourned day, the Court made the rule absolute without an affidavit of personal service, —holding, upon the authority of *Cartwright* v. *Blackworth* (1 Dowl. 489), that the appearance of counsel and his consenting to the rule being enlarged was a waiver of personal service. Ex parte Alcock - - - - - - - - 68

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See Substituted Service.

WRIT SPECIALLY INDORSED—*Practice—Leave to sign Judgment under Order XIV., Rule* 3—*Affidavit in Reply to Defendant's Answer.*] Upon an application by the plaintiff for leave to sign judgment under Order XIV., Rule 3, the Court or judge may in their or his discretion allow the plaintiff to file an affidavit in reply to the defendant's affidavit. Davis *v.* Spence - - 719

WRIT UNDER BILLS OF EXCHANGE ACT (18 *&* 19 *Vict. c.* 67)—*Notice to appear in District Registry—Judicature Act*, 1873, *s.* 64—*Judicature Act*, 1875, *Order II., Rule* 6; *Order V., Rule* 1.] A writ under the Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67), may issue out of a district registry; and, in that case, notwithstanding neither party resides or carries on business within the district, the notice may require the defendant to apply for leave to appear, and to appear in the district registry without suggesting that he may obtain leave to appear in London.—Where, however, a defendant is served with a writ issued out of a district registry within the jurisdiction of which he neither resides nor carries on business, he may (under Order XXXV., Rule 1) obtain an order of the Court or a judge to have the subsequent proceedings taken in London. Oger *v.* Brandum - - - - - - 334

END OF VOL. I.

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